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No. ____

IN THE
Supreme Court of the United States

ROBERT A. UNDERWOOD AND FRANK B. AGUON, JR.,
Petitioners,

v.

FELIX P. CAMACHO, MICHAEL CRUZ AND
THE GUAM ELECTION COMMISSION,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Guam

PETITION FOR A WRIT OF CERTORARI

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
37th Floor
New York, NY 10022
(212) 891-1600

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Whether under the Organic Act of Guam, 48 U.S.C. § 1422, a vote cast improperly is nevertheless a "vote cast" for the limited purpose of determining whether candidates for Governor and Lieutenant Governor of Guam earned a "majority of the votes cast" necessary to win an election?

PARTIES TO THE PROCEEDING

Petitioners are Robert A. Underwood and Frank B. Aguon, Jr. Respondents are Felix P. Camacho and Michael Cruz and the Guam Election Commission.

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PETITION FOR A WRIT OF CERTORARI

Petitioners Robert A. Underwood and Frank B. Aguon, Jr., respectfully request that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Guam.

OPINION AND MEMORANDUM BELOW

The decision of the Supreme Court of Guam, available at 2006 Guam 17 and 2006 WL 3747313, is reprinted at Appendix A.

The memorandum of Cesar C. Cabot, Esq., Legal Counsel to Guam Election Commission, to Frederick J. Horecky, Chairman of Guam Election Commission and Gerald A. Taitano, Executive Director of Guam Election

Commission, dated November 9, 2006, is unreported, and is reprinted at Appendix B.

JURISDICTION

The judgment of the Supreme Court of Guam was entered on December 19, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and 48 U.S.C. § 1424-2 (as amended in 2004).

STATUTES INVOLVED

The Organic Act of Guam, 48 U.S.C. § 1422, states in pertinent part:

> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. The Governor and Lieutenant Governor shall hold office for a term of four years and until their successors are elected and qualified.

Title 3 of the Guam Code Annotated, section 11114 provides:

If a voter indicates either:

(a) by placing the voter's marks in the voting ovals or other spaces adjacent to the names of any candidates or nominees;

(b) by writing the names of persons for an office in the blank spaces, or

(c) by a combination of both, the choice of more than there are candidates or nominees to be elected or certified for any office, or if for any reason it is impossible to determine the voter's choice for any office, the voter's ballot shall not be counted for that office, but the rest of the voter's ballot, if properly marked, shall be counted. A ballot that is blank, or that is marked with more candidates or nominees than are to be nominated or elected, is not to be included as a part of the base for determining what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.

STATEMENT OF THE CASE

Petitioners Robert A. Underwood and Frank B. Aguon, Jr., ("Petitioners" or, collectively, "Underwood") were candidates for Governor and Lieutenant Governor, respectively, in the Territory of Guam's 2006 General Election. They seek review of the Supreme Court of Guam's decision refusing to direct the Guam Election Commission (the "Election Commission") to conduct a runoff gubernatorial election due to the failure of any slate to receive a "majority of the votes cast" as required by the Guam Organic Act, 48 U.S.C. § 1422. At issue is whether votes cast improperly--so-called "overvotes"--were lawfully excluded from the total pool of votes used in determining whether Respondents Felix P. Camacho and Michael Cruz

("Respondents" or, collectively, "Camacho") received a majority of all votes cast, thus avoiding a runoff.

When they ran for office, Petitioners had every reason to expect that the winning candidates would need to earn a majority of all votes cast in the gubernatorial election, including overvotes, since that was the consistent prior practice in Guam. But the Election Commission changed that practice, and this change was upheld by the Supreme Court of Guam, largely as a result of confusion about the meaning of this Court's prior decision in *Gutierrez v. Ada*, 528 U.S. 250, 252 (2000) ("*Gutierrez*"). As we show, *Gutierrez* did not speak at all to the issue at hand. It thus provided no valid justification for changing the rules after the election and suddenly disregarding the strong arguments for reading the Guam Organic Act as demanding that overvotes be counted.

Given that the outcome of gubernatorial elections in Guam and the Virgin Islands (which has a nearly identical statute) frequently turns on a proper interpretation of the majority-vote requirement, the Court should take this opportunity to assure that the Guam Organic Act is correctly and definitively construed. Absent such a clarification, there is a very real prospect that the next election will again be litigated but this time in federal court, possibly producing yet another after-the-fact change in the rules of the game. That kind of uncertainty, especially when it is spawned by a misreading of this Court's prior decision and risks delaying the finality of future gubernatorial elections, ought to be avoided by a grant of review here.

A. Overvotes and the Requirement of Winning a Majority of "Votes Cast".

When it passed the Guam Elective Governor Act in 1968 as an amendment to the Guam Organic Act, thus allowing Guam to elect its governor for the first time, Congress

expressly mandated that there would be a runoff in any election where no candidate received an absolute majority of the "votes cast." 48 U.S.C. § 1422. The legislative history indicates that this requirement was inserted because of concerns about factionalism. For example, in a hearing on the Elective Governor Act, a Guam attorney, referring to the presence of three viable political parties in the Territory and expressing his endorsement of a majority-vote requirement, testified: "I believe that the Governor should receive the mandate of a majority vote, not a plurality vote as are being now enjoyed by other States or countries. To me I believe an endorsement of the majority is more proper than a mere plurality vote . . . [T]o me [it is] a better system that the one who has the highest office in Guam should receive the mandate of the majority." *Guam--Elective Governor: Hearings Before the Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong. 12 (1968) (statement of Alberto T. Lamorena). Moreover, in codifying that view, Congress did not choose to phrase the majority-vote rule as requiring a majority of "legal votes" or "valid votes", as it has done in other similar laws passed both before and since. *See, e.g.*, Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); Hawaiian Statehood Act, Pub. L. No. 86-3, 73 Stat. 4 (1959); Northern Marianas Covenant, Pub. L. No. 94-241, 93 Stat. 263 (1976); Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

Overvotes, also deemed "spoiled ballots", may occur in multiple situations, including: when a voter has cast votes for multiple named candidates; when a voter has marked off one named candidate and written in a second different name; or when a voter has marked off one named candidate and written in that same candidate's name. Overvotes can be an intentional form of protest but most often occur inadvertently. They can also be the product of fraud,

including when a voter's selection on a paper ballot is effectively negated by another person marking off an additional candidate.

From the time of Guam's first gubernatorial election until 2006, the Election Commission always treated overvotes as part of the pool of votes for purposes of applying the majority-vote requirement. *See* Pet. App. 24a n.4.[1] That makes sense because overvotes reflect voters who tried but failed to participate in the gubernatorial election or deliberately cast an invalid vote as a form of protest. They were therefore part of the electorate for that election, even if their votes did not end up in the column of any individual candidate. Such a rule is also consistent with the undisputed practice of counting for majority-vote purposes all write-in votes, even if cast as a protest vote or for a cartoon character.

By contrast, the Election Commission did not always count undervotes, which reflect voters who participated in other elections but did nothing with regard to the gubernatorial election. For example, in the 1998 election, it counted overvotes and not undervotes. *Gutierrez*, 528 U.S. at 252 (2000) ("*Gutierrez*"). As a result, when the 1998 election result was challenged by losing candidates seeking a

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[1] In the opinion below, the Supreme Court of Guam wrote that "[w]e also reject Underwood/Aguon's related argument that 3 GCA § 11114 should not be complied with because of the [Election] Commission's historical practice of *not* including overvotes in determining whether a gubernatorial slate has garnered the requisite majority. We agree with Camacho/Cruz that failure to enforce the law in prior elections does not forgive the failure to follow the law in this election." Pet. App. 24a n.4 (underscore added). The italicized "not" is an obvious typographical error, and must be read out in order for the quoted sentences to make sense both independently and in the context of the opinion. The Guam law supposedly not being complied with, as amended in 2000 following *Gutierrez*, specifically *excludes* overvotes in determining whether a gubernatorial team has reached a majority of the votes. 3 Guam Code Ann. § 11114(c).

runoff, the focus was entirely on the failure of the Election Commission to count undervotes. The argument there was that in section 1422, by demanding a "majority of the votes cast *in any election*" (emphasis added), Congress signified that the pool should include any voter who cast a vote for any office on the same day as the gubernatorial election. That argument prevailed in the district court, *Ada v. Government of Guam*, No. Civ. 98-66, 1998 WL 1118593 (D. Guam Dec. 9, 1998), and the Ninth Circuit Court of Appeals, *Ada v. Government of Guam*, 179 F.3d 672, 675 (9th Cir. 1999), but it was rejected by this Court. In *Gutierrez*, the Court held that because Congress used the term "votes cast" rather than "ballots cast", the statute does not call for inclusion in the pool of persons who never even attempted to participate in the gubernatorial election, just because they voted in some other election the same day. 528 U.S. at 255-56. The Court added that the phrase "in any election" was not properly read as referring to elections other than those for governor. *Id.* at 255-58.

B. The 2006 Gubernatorial Election.

Eight years after the election at issue in *Gutierrez*, Petitioners Underwood and Aguon received 18,700 votes in the November 7, 2006 general election. Pet. App. 3a. Respondents Camacho and Cruz received 19,560 votes. *Id.* An additional 668 write-in votes were reported, along with 504 overvotes. *Id.* At a November 9, 2006 Election Commission meeting, counsel for the Election Commission submitted a memorandum entitled *Interpretation of the Term 'Majority of Votes Cast' Pursuant to the Organic Act of Guam, 48 U.S.C. § 1422 and 3 GCA § 11114(c)* (the "Election Commission Opinion").[2] Pet. App. 4a. That

[2] Memorandum from Cesar C. Cabot, Esq., Legal Counsel to Guam Election Commission, to Frederick J. Horecky, Chairman of Guam

opinion advised that the Guam Organic Act, Guamanian law and this Court's decision in *Gutierrez* compelled excluding overvotes from the vote pool in determining whether any one slate received a "majority of the votes cast" under section 1422. The next day, relying on the counsel opinion and departing from established prior practice, a divided Election Commission voted to exclude overvotes and certified the Camacho slate as the election winner. In so doing, the Election Commission found that Camacho received 19,560 out of 38,928 votes, or 50.25%. Had the Election Commission included overvotes in the vote base, Camacho, with only 49.60% of 39,432 votes, would not have been declared victorious, and, in accord with section 1422, a runoff election would have been conducted within days. Pet. App. 4a.

On November 13, 2006, Underwood filed a Petition for a Writ of Mandamus with the Supreme Court of Guam seeking a runoff, asserting that because no gubernatorial slate obtained the necessary majority of votes cast in the general election, the Election Commission's certification of a winner violated section 1422. On December 19, 2006, the Supreme Court of Guam denied that petition, holding that section 1422 bars overvotes from the total vote count. Pet. App. A.

In so ruling, the court noted that the Guam Legislature had recently amended the statute defining overvotes, Title 3 of the Guam Code Annotated ("G.C.A."), § 11114. That statute had previously provided that an overvote would not be counted in favor of any single candidate, without specifying whether overvotes are in the majority-vote pool. *See Ada v. Government of Guam*, 179 F.3d 672, 682 (9th Cir. 1999), *rev'd on other grounds*, 528 U.S. 250 (2000). But five months following the *Gutierrez* decision, the Guam

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Election Commission and Gerald A. Taitano, Executive Director of Guam Election Commission (November 9, 2006). Pet. App. B.

Legislature changed section 11114, acting, as described by the editor of the codification, as it thought necessary to "reflect the holding in *Gutierrez*, U.S. Supreme Court, reversing District Court of Guam and 9th Circuit Court of Appeals by a unanimous decision." 3 G.C.A. § 11114, Court Decisions. The pertinent amendment added to subsection (c) the following new language:

> A ballot that is blank, or that is marked with more candidates or nominees than are to be nominated or elected, is not to be included as a part of the base for determining what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.

3 G.C.A. § 11114(c). Thus, from all appearances, the legislature provided that overvotes would not be in the majority-vote pool because it mistakenly believed that such a rule was needed to conform to *Gutierrez*.

The Supreme Court of Guam did not treat this statute as directly controlling because it recognized "that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act," which functions as Guam's constitution. Pet. App. 7a. The statute, however, led the court to recognize a presumption in favor of the constitutionality of excluding overvotes from the majority-vote pool. *Id.* 21a-22a. And when the court construed the term "votes cast" in section 1422 of the Organic Act, it concluded that Congress did not mean to include votes cast improperly, either by mistake or on purpose, in determining whether any candidate received a majority of the vote. Like the Guam Legislature, it too drew support for this rule from *Gutierrez*, apparently seeing no significant difference between (1) excluding voters who never participated in the gubernatorial election at all (the issue in *Gutierrez*) and (2)

excluding voters who tried to vote but made a mistake or who voted twice as a form of protest:

> Accordingly, we hold that the 504 persons who did not express a choice or selection of a Governor and Lieutenant Governor in the November 7, 2006 General Election have assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election.
>
> In so holding, we construe the Organic Act to require that the Governor and Lieutenant Governor of Guam be elected by a "majority of all those who cared to make any choice among gubernatorial candidates." *Gutierrez*, 528 U.S. at 256.

Pet. App. 11a.

REASONS FOR GRANTING THE PETITION

This case presents a significant and recurring question that this Court should resolve. The Supreme Court of Guam's equation under section 1422 of overvotes with complete voter abstentions from the gubernatorial race, which allowed a finding that Camacho held a majority and not a mere plurality of votes, is unprecedented and sanctions a reversal of past Guamanian practice taken because of a misapprehension of the Court's *Gutierrez* decision. If Guam's highest court as well as its legislature and Election Commission are all mistaken about the import and reach of *Gutierrez* with respect to overvotes, as Petitioners contend they are, only this Court can set them right.

Moreover, the misinterpretation of *Gutierrez* and section 1422 should be corrected now rather than later, for three reasons. First, this unresolved question impacts not only Guam and its most recent and future elections, but the Virgin Islands as well. Under the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1591, a runoff election for Governor and

Lieutenant Governor is required "[i]f no candidates receive a majority of the votes cast in any election." That language, identical to the language found in section 1422, has also been the subject of dispute. *See Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982).

Second, it is quite likely that another case raising this same issue will arise in the near future. Two of the last three Guamanian elections have seen the smallest of margins separating the Democratic and Republican teams. The Virgin Islands' most recent general election, also held in November of 2006, nearly implicated the "majority of the votes cast" provision as well. There, none of the three Governor/Lieutenant Governor slates earned a majority of the votes cast; the closest a slate came was 49.33%. Pursuant to 48 U.S.C. § 1591, a runoff election was held.[3]

Third, denying review will leave in place an intolerable level of uncertainty about the basic rules governing Guam's electoral system. In the next election raising the overvote issue, the losing side will surely litigate the issue again, but this time in the Guam federal district court. That court will not be bound by the Supreme Court of Guam's reading of the Organic Act, which is after all a *federal* statute. And, as we show *infra*, there are good reasons for anticipating that the next decision will go back to including overvotes in the majority-vote pool. Rather than leave such uncertainty in place, it would be far preferable for an Article III court--*i.e.*, this Court--to address this issue of federal law definitively now.

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[3]*See* Megan Poinski, *V.I. Gubernatorial Runoff is Historic But Not Rare*, The Virgin Islands Daily News, Nov. 9, 2006; *US Virgin Islands Set Runoff for Governor on 2-Vote Gap*, Dow Jones Newswires, Nov. 19, 2006.

I. THE PRIMARY REASON THAT OVERVOTES SUDDENLY WERE NOT COUNTED IN THE 2006 ELECTION WAS A SERIES OF MISREADINGS OF THIS COURT'S *GUTIERREZ* DECISION.

The Supreme Court of Guam's holding that this Court's rationale in *Gutierrez* dictates exclusion of overvotes from the vote base raises an important question about *Gutierrez*'s meaning and reach. Indeed, it represented Guam's third official misreading of *Gutierrez* to hold that overvotes must be disregarded contrary to the Territory's history of including overvotes in the section 1422's vote base.

Prior to *Gutierrez*, Guamanian law, which is "constrained by the Organic Act" (Pet. App. 7a, quoting *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996)), barred overvotes from counting for any one candidate, but did not exclude them from section 1422's vote base. 3 G.C.A. § 11114 (1999), amended by Guam Pub. L. No. 25-146:46 (May 27, 2000); *Ada v. Government of Guam*, 179 F.3d at 682, *rev'd on other grounds*, 528 U.S. 250 (interpreting pre-amendment section 11114). The post-*Gutierrez* amended version of section 11114 "clearly requires" the exclusion of overvotes from the vote base. Pet. App. 23a.[4] The new exclusion was added by the Guam Legislature to, at least in part, "reflect" *Gutierrez*. 3 G.C.A. § 11114, Court Decisions. That misreading of *Gutierrez* led to another. Following the 2006 election, the Election Commission, acting on advice of its counsel, certified Respondents as the election winners by not counting overvotes in the vote base. The Election Commission's counsel found the exclusion of overvotes to "be in accord with the U.S. Supreme Court's ruling in

[4] As Petitioners maintain that overvotes are considered "votes cast" under section 1422, 3 G.C.A. § 11114 impermissibly conflicts with the Guam Organic Act and is therefore invalid. *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); Pet. App. 7a-8a.

Gutierrez." Pet. App. 30a. Previously, the Election Commission counted overvotes in the denominator when determining whether a majority of the vote had been reached. *See Gutierrez*, 528 U.S. at 252.

The Commission's new position led to this litigation in which the Supreme Court of Guam claimed to find support for exclusion of overvotes in *Gutierrez*. On the one hand, the Supreme Court of Guam acknowledged that the "Ninth Circuit court's reference to overvotes was not necessary to the adjudication of the case." Pet. App. 15a. It was "therefore regard[ed] . . . as dicta . . . . [as t]he Ninth Circuit *Ada* case . . . clearly was not argued and not decided on the issue of overvotes." *Id.* 15a-16a. On the other hand, despite its recognition that overvotes were not at issue in *Ada*, the Supreme Court of Guam found that this Court's reversal of the Ninth Circuit in *Gutierrez* somehow did address the overvote issue. *Id.* 17a-18a.

Overvotes were not before the Court in *Gutierrez*, and the Supreme Court of Guam's reliance on the case is misplaced.[5] The rationale Petitioner's advance to support counting overvotes in the vote base is not the one rejected in *Gutierrez* -- *i.e.*, the notion that the statutory term "votes cast" equates with "ballots cast" for any office on the same day as the gubernatorial election. Petitioners maintain that overvotes are "votes cast" because they reflect voters who participated

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[5] In addition to a plain reading of the *Gutierrez* decision, the Court's explanation for granting certiorari in that case--"to resolve a split between the Ninth Circuit's interpretation of the Organic Act of Guam and the Third Circuit's reading of identical language in the Revised Organic Act of the Virgin Islands" (528 U.S. at 254)--establishes that *Gutierrez* did not concern overvotes. The Third Circuit in *Todman*, the case occupying one side of the divide, expressly stated that "we need not reach the question of whether the 'votes cast' language . . . includes spoiled ballots." 694 F.2d at 941.

in the gubernatorial election itself, albeit failing to cast *valid* votes that could be credited to a candidate. *Gutierrez* did not focus on the breadth of the term "votes cast." Indeed, the Supreme Court of Guam's effort to define a "vote cast" by invoking a series of unrelated cases from this Court dating back to 1877 makes manifest that *Gutierrez* is silent on whether overvotes are "votes cast" pursuant to section 1422. Pet. App. 8a-12a. *Gutierrez* instead focused principally on the words "in any election" in section 1422.[6] Here, Petitioners contend that the Election Commission need not look beyond the number of registered voters who made markings in the gubernatorial portion of the 2006 general election ballot. Petitioners' position is therefore entirely consistent with and supported by *Gutierrez*'s reading of "any election" to mean the "election for Governor and Lieutenant Governor." *Gutierrez*, 528 U.S. at 254-55.

II. THIS CASE PRESENTS AN ISSUE THAT IS LIKELY TO RECUR AND SHOULD NOT BE LEFT UNRESOLVED.

The question presented here, involving as it does a basic rule governing how votes will be counted in at least two different territories, should not be left unaddressed. As noted above, recent history suggests that we will very soon see another election close enough so that it will again matter whether overvotes are or are not part of the pool of votes considered in applying the majority-vote requirement. Moreover, denying review, far from leaving matters settled,

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[6] According to the Court, "[t]he question [in *Gutierrez* was] whether [section 1422] compels a runoff election when a candidate slate has received a majority of the votes cast for Governor and Lieutenant Governor, but not a majority of the number of ballots cast in the simultaneous general election." *Gutierrez*, 528 U.S. at 251. The Court stated that "[t]he key to understanding what the phrase 'in any election' means is also the most salient feature of the provision in which it occurs." *Id.* at 254.

will only serve to set the table for yet another litigated election outcome.

The reason is that the Supreme Court of Guam does not have the final say on the interpretation of the Organic Act, even in Guam. As that court put it in the decision here on review:

> The Organic Act has the unique distinction of being Guam's *de facto* constitution, and, at the same time, a federal law. This creates the anomalous situation wherein two separate and independent court systems -- the federal and local courts -- have original jurisdiction over questions arising under the Organic Act and could conceivably render opposing opinions.

Pet. App. 13a (internal citation omitted).

Because Guam's "constitution" is a statute passed by Congress, the next party aggrieved by the Election Commission's application of the majority-vote requirement will have the option of proceeding into federal court and arguing the issue afresh. When that occurs, there is every reason to anticipate that the result may be yet another change in the basic electoral rules. After all, as we note *infra*, the ruling below has little to recommend on the merits, once the erroneous reading of *Gutierrez* is corrected. But in the meantime, candidates and voters will have to proceed without knowing a definitive answer. This kind of legal question, going to the heart of the process by which Guam's chief executive is elected, ought not be left unresolved until another electoral crisis presents itself.

III. THE PLAIN LANGUAGE OF THE ORGANIC ACT ARGUES STRONGLY IN FAVOR OF INCLUDING OVERVOTES IN THE VOTE BASE USED TO DETERMINE WHETHER A CANDIDATE HAS RECEIVED A MAJORITY OF VOTES CAST.

"The starting point" in arriving at the meaning of "majority of votes cast" under section 1422 "is the language [of the statute] itself." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). By its plain language, an overvote is a "vote cast" under section 1422. A spoiled ballot, such as each ballot containing an overvote here, is "[a] ballot reflecting a *vote* that cannot be counted because it was *cast* in a form or manner that does not comply with the applicable rules." *Black's Law Dictionary* 153 (8th ed. 2004) (emphasis added).[7] The Supreme Court of Guam failed to respect the distinction between votes that are *cast* and votes that are *counted* for any one candidate.

If Congress had intended to exclude overvotes from the term "votes cast", it could easily have done so. If, in using the phrase "votes cast", Congress actually meant "votes counted", it could have drafted section 1422 accordingly. When Congress has intended to restrict the term "votes cast" in such a manner, it has done so, both before and after section 1422 was enacted. In the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), a referendum submitted to Alaskans concerning Alaska's admission into the Union as a state required a "majority of the *legal* votes cast" § 8, 72 Stat. 344 (emphasis added). That same language was used by Congress in a referendum concerning Hawaii's statehood in the Hawaiian Statehood Act, Pub. L. No. 86-3, § 7, 73 Stat. 4, 7 (1959). Similar language was employed in the Northern

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[7] Similarly, an "unintelligible vote" is "[a]n otherwise legal *vote cast* in a form from which the tellers cannot ascertain the voter's intent." *Black's Law Dictionary* 1607 (8th ed. 2004) (emphasis added).

Marianas Covenant, Pub. L. No. 94-241, § 1001, 90 Stat. 263, 277 (1976), in which Congress mandated "a majority of at least 55% of the *valid* votes cast" for a vote to approve the Covenant of the Northern Mariana Islands (emphasis added). Congress has also used the modifier "valid" when referring to "ballots cast" in certain elections. *See* Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (requiring a "majority of the valid ballots cast" in the Federated States of Micronesia); Compact of Free Association, Pub. L. No. 99-658, 100 Stat. 3672 (1986) (for the Republic of Palau, also requiring a "majority of the valid ballots cast").[8]

A construction of section 1422's "votes cast" that would exclude overvotes would require the Court to add language--such as "votes counted", or "legal votes cast", or "valid ballots cast"--that simply does not appear in the statute. That kind of judicial rewriting is disfavored. *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29 (1977) (". . . [W]e ordinarily resist reading words or elements into a statute that do not appear on its face"); *Gutierrez*, 528 U.S. at 255-56 (observing that "[s]urely a Congress that meant to refer to ballots, midway through a statute repeatedly referring to 'votes' for gubernatorial slates, would have said 'ballots'"). It ought to be up to Congress, not the Supreme Court of Guam, to decide the policy question whether it makes sense to lower the majority-vote requirement by excluding overvotes from the pool. Indeed, Congress has shown the

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[8] In *Gutierrez*, the Court distinguished between elections for office and referenda in assessing assorted state cases that required "a majority of voters going to the polls, not a mere majority of persons voting on a particular referendum issue." 528 U.S. at 256. That distinction does not provide a meaningful explanation here for why Congress chose to use the adjectives "legal" and "valid" in one context and not the present one if it actually meant the same thing in both instances.

ability to make such adjustments. For example, it recently eliminated the requirement of a majority-vote for the office of Delegate from American Samoa, unless and until the Legislature of American Samoa creates a system of primary elections for that office. *See* Armed Services Members Voting Rights Protection, Pub. L. No. 108-376, 118 Stat. 2200 (2004) (amending 48 U.S.C. § 1732(d)).

Certainly there is nothing in the reasoning of the Supreme Court of Guam suggesting that it had good reason to exclude overvotes for purposes of determining whether Respondents received a majority of votes cast. It relied on two unpersuasive arguments. First, it equated persons who cast votes in the gubernatorial election improperly with persons who did not vote at all. That false analogy is apparent not only in the court's reliance on *Gutierrez* but also in its discussion of *County of Cass v. Johnston*, 95 U.S. 360 (1877). There, this Court held that *non*-voters should not be counted in determining whether a bond issue had received the legally required "two-thirds of the qualified voters of the township." 95 U.S. at 365. The Supreme Court of Guam extracted incorrectly from *Cass* "[t]he general principle . . . that where a voter does not express his will in an election, he assents to those voters who do." Pet. App. 8a. But nothing in *Cass* begins to support the proposition that persons who cast overvotes (as opposed to non-voters) are properly excluded from consideration for purposes of the majority-vote rule. Consider the prototypical case of a voter who votes for a candidate and then, out of excessive enthusiasm, also writes in that same candidates name. Such a vote may not be properly counted for the preferred candidate, but that voter certainly did not "assent" to be excluded from the electorate for purposes of the majority-vote rule.

Second, the Supreme Court of Guam relied on cases supporting the proposition that the purpose of an election is

to make a "choice" among candidates. *See* Pet. App. 8a-12a (citing *Newberry v. United States*, 256 U.S. 232 (1921); *United States v. Classic*, 313 U.S. 299 (1941); *Foster v. Love*, 522 U.S. 67 (1997); *Bush v. Gore*, 531 U.S. 98 (2000); and *Burdick v. Takushi*, 504 U.S. 428 (1992)). But those cases obviously provide no real insight as to the intent of Congress when it chose to mandate that Guam gubernatorial candidates receive a majority of "votes cast."[9] They are simply a make-weight part of the court's analysis.

Particularly ironic is the court's reliance on *Burdick*, where this Court addressed whether there is a constitutional right to the opportunity to cast a write-in vote. As noted above, Guam's gubernatorial ballot provides for write-in voting, and it is uncontested that all of the 668 write-in votes in the 2006 gubernatorial election are included in the vote base, regardless of their content. Those votes may well be non-final in nature, or expressions of a non-choice, or

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[9] In *United States v. Classic*, for example, the Court held that "the right of voters at [a Congressional] primary [election] to have their votes counted is . . . a right or privilege secured by the Constitution." 313 U.S. 299, 325 (1941). The Supreme Court of Guam's equation of overvotes with abstentions and non-participation is inconsistent with *Classic*'s strengthening of the "right of the elector to have his ballot counted." *Id.* at 318. In refusing to acknowledge that those who overvoted took electoral action along with those who had their votes counted, the Supreme Court of Guam erroneously narrowed that right of participation under Guam's Organic Act (the Territory's constitution) and ignored this Court's admonition that "[w]ords, especially those of a constitution, are not to be read with such stultifying narrowness." *Id.* at 320. In *Foster v. Love*, although the Court noted that an election involves combined voter action "*meant* to make a final selection of an officeholder", (522 U.S. 67, 71 (1997) (emphasis added)), section 1422's requirement of a "majority of the votes cast", and not a simple plurality, and its recognition of the possibility of and provision for a runoff, demonstrate that a contest for office need not end in the "final selection" of an officeholder to be an election.

expressions of discontent or some other display; they may include votes for fictional characters, or the deceased, or persons not legally qualified to serve as Governor and Lieutenant Governor of Guam. There is no suggestion in the record that such votes of the evidently discontented--which appear to fall outside the Supreme Court of Guam's definition of a "vote cast"--are excluded from section 1422's vote base. The Supreme Court of Guam failed to provide any explanation for why under its own construction of section 1422 such write-in votes are swept into the base while overvotes are swept out.[10]

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[10] The Supreme Court of Guam's reliance on *Bush v. Gore*, 531 U.S. 98 (2000) and *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000), as support for its reading of section 1422 was also particularly unpersuasive. Pet. App. 9a-10a. First, those cases involved the counting of votes in favor of specific candidates in a plurality-rule election, not, as we have here, a question of whether a category of votes populates the vote pool under a majority-rule federal statute. Second, the injunction that "[i]n certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements" only begs the question further of what are those "legal requirements" under section 1422. Pet. App. 9a (quoting *Bush*, 531 U.S. at 103). The "clear indication of the intent of the voter" standard cited by the Supreme Court of Guam is one rooted in Florida statutory law, and finds no analog in section 1422. In any case, it is clear that a voter who returns a ballot overvoted on the gubernatorial portion of the ballot intended to be counted in some way in that contest, and not ignored entirely. Third, as the Supreme Court of Guam noted, Florida law distinguishes between "illegal votes" and "legal votes" in conferring "grounds for contesting an election." Pet. App. 10a; Fla. Stat. § 102.168(3)(c). That law demonstrates the capacity of legislatures to distinguish among types of votes. Congress drew no such distinction in section 1422.

IV. THE SUPREME COURT OF GUAM'S EXCLUSION OF OVERVOTES IS INCOMPATIBLE WITH THE POLICY OBJECTIVES SUPPORTING SECTION 1422'S MAJORITY-VOTE REQUIREMENT.

The legislative history underlying section 1422 reveals a deliberate decision on Congress's part to see that Guam's Governor and Lieutenant Governor earn a real majority, and not a simple plurality, of votes cast. The choice was taken with an understanding that difficulty choosing candidates for those offices and a runoff election could well result. That history supports a broader reading of "votes cast" than that given by the Supreme Court of Guam.

The pertinent portion of the provision at issue was enacted in 1968 through the Guam Elective Governor Act. *See* Guam Elective Governor Act, Pub. L. No. 90-497, 82 Stat. 842 (1968). The Virgin Islands' identical majority-rule Elective Governor Act was passed that same year. *See* Virgin Islands Elective Governor Act, Pub. L. No. 90-496, 82 Stat. 837 (1968). In considering those Acts, the "majority of the votes cast" requirement was specifically deliberated. At a hearing concerning the Guam and Virgin Islands Elective Governors Acts, Augustin Doward, Minority Leader in the Virgin Islands Legislature, objected to the legislation's requirement that a runoff occur if no gubernatorial candidate received a "majority of the votes cast", stating:

> [I]nstead of a majority, we feel that a simple plurality should suffice in determining who is going to be Governor. Our reason for this is that the Virgin Islands elections at times are very close. It is conceivable that no one individual would get a majority of votes during the election. This would necessitate a run-off which is not only costly for the government but also very costly for the candidates.

> In this present day and age campaigning is very, very expensive in the Virgin Islands and we feel we should do whatever is possible to avoid this.

Guam-Virgin Islands Elective Governors: Hearings Before the S. Territories and Insular Affairs Subcomm. and the S. Comm. on Interior and Insular Affairs, 90th Cong. 45-46 (1967).

The Subcommittee Chairman, Senator Quentin Burdick, responded to this objection by inquiring of Mr. Doward: "[Y]ou have two parties now . . . suppose you should have a third party growing up in the Islands. Suppose you have an election and one party receives 34 percent of the vote which is the most votes. Would you say that there should not be a run-off in that case?" *Id.* at 46. Mr. Doward restated his preference, but noted it was not a strong one. *Id.*

A similar deliberation occurred in the House of Representatives. In a hearing on the Guam Elective Governor Act, Representative Richard White called attention to the proposed legislation's "require[ment of] a runoff election in the event that the leading candidate does not receive a majority of the votes," stating "I am not aware of any governorship in the United States that requires a runoff election in the event that the leading candidate does not receive a majority of the votes." *Guam--Elective Governor: Hearings Before the Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong. 12 (1968). Representative White asked Alberto T. Lamorena, a Guam attorney, "[D]o you prefer the majority-vote? . . . [D]o you want another runoff election or do you want the leading candidate to receive the office?" *Id.* Mr. Lamorena responded:

> Personally, especially so now that there seems to be three parties here in the island of Guam, personally I would prefer the majority-vote. I believe that the

> Governor should receive the mandate of a majority-vote, not a plurality vote as are being now enjoyed by other States or countries. To me I believe an endorsement of the majority is more proper than a mere plurality vote. I know that it's taxing to get a runoff election where the highest candidate running for that elective office gets merely the plurality of the vote. But it is, I believe, to me a better system that the one who has the highest office in Guam should receive the mandate of the majority.

Id.

Those exchanges illustrate Congress's awareness of the difficulties a majority-vote requirement could pose, including in a two-party system. With that knowledge, Congress nevertheless opted for the majority-vote requirement, placing Guam (and the Virgin Islands) outside the States' customary plurality requirements and practices. Although the hearings show specific consideration was given to accommodating three-party systems in place at the time in Guam and the Virgin Islands, had Congress intended for the majority-vote and runoff requirements to apply only when more than two named candidates appeared on the ballot, legislation could have tailored appropriately. Congress, in passing section 1422, expressed its view that specified officeholders in Guam should rule with the added legitimacy afforded by a victory from a majority. Given that objective, the proper course is to read section 1422 to require a majority achieved without cutting out a group of voters who unmistakably took part in the election contest.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
37th Floor
New York, NY 10022
(212) 891-1600

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioners
** Counsel of Record*

March 16, 2007

APPENDIX

DEC 19, 2006

APPENDIX A

IN THE SUPREME COURT OF GUAM

ROBERT A. UNDERWOOD and FRANK B. AGUON JR.
Petitioners,

vs.

THE GUAM ELECTION COMMISSION
Respondent,

FELIX P. CAMACHO and MICHAEL CRUZ,
Real Parties in Interest.

Supreme Court Case No.: WRM06-003

OPINION

Cite as: 2006 Guam 17

Argued and submitted on November 30, 2006
Hagatna, Guam

BEFORE: F. PHILIP CARBULLIDO, Chief Justice;
RICHARD H. BENSON, Justice *Pro Tempore;*
J. BRADLEY KLEMM, Justice *Pro Tempore.*

CARBULLIDO, C.J.:

Petitioners Robert A. Underwood and Frank B. Aguon, Jr. ("Underwood/Aguon") filed a Verified Petition for a Writ of Mandamus, requesting that this court order the Respondent Guam Election Commission "to comply with its non-discretionary duty and conduct a runoff as mandated by the Organic Act." In particular, Underwood/Aguon argue that the Real Parties in Interest Felix P. Camacho and Michael Cruz ("Camacho/Cruz") were improperly certified as winners of the 2006 gubernatorial election because the Commission failed to include overvotes in the total number of votes cast, in violation of the Organic Act. Underwood/Aguon argue that had the overvotes been included in the mathematical determination of whether Camacho/Cruz met the threshold requirement of 50% plus one vote, Camacho/Cruz would have in fact achieved less than the requisite majority, and as such, a runoff election would be required pursuant to the Organic Act.

Guam's Governor and Lieutenant Governor are elected pursuant to section 1422 of the Organic Act, which provides: "The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam." 48 U.S.C. § 1422. Consequently, the issue before us is whether the Commission properly excluded overvotes in determining whether the Camacho/Cruz team were "elected by a majority of votes cast," as such term is used in the Organic Act of Guam. 48 U.S.C. § 1422.

We hold that in order to determine whether a gubernatorial slate has been "elected by a majority of the votes cast," as such phrase is used in the Organic Act of Guam, only expressions of will or choice, or final selections of a gubernatorial slate, may be properly included in the total

number of votes cast. The converse of this rule is that the persons who overvote, or vote for both gubernatorial slates, do not express their will in deciding who should be the next Governor and Lieutenant Governor, and in doing so, they assent to the will of the voters who have properly expressed their will and duly participated in such election. Accordingly, we hold that the Organic Act requires that overvotes be excluded by the Commission for purposes of determining whether a gubernatorial slate has been "elected by a majority of votes cast." For this reason, we deny the Verified Petition for a Writ of Mandamus.

I.

On November 7, 2006, the Guam Election Commission conducted the General Election, *inter alia*, so that the voters of Guam could determine who shall be elected to the offices of Governor and Lieutenant Governor. Petitioners Underwood/Aguon ran on the Democratic ticket for Governor and Lieutenant Governor against the Real Parties in Interest, the Republican team of Camacho/Cruz.

According to the Commission's Summary Report prepared on November 13, 2006, the Underwood/Aguon team received 18,700 votes and the Camacho/Cruz team received 19,560 votes. Petitioner's Excerpts of Record ("ER") at 2 (Nov. 22, 2006). In this same report, the Commission reported 668 write-in votes which were not credited to either candidate, 657 undervotes and 504 overvotes.

It is undisputed that the Underwood/Aguon votes, Camacho/Cruz votes, and write-in votes must be included in the total number of votes cast ("the base") for purposes of mathematically determining whether Camacho/Cruz received the requisite majority. This amounts to a sum total of 38,928 votes. It is also undisputed that undervotes, or blank ballots,

are not to be included in the base. *Gutierrez v. Ada*, 528 U.S. 250 (2000), *rev g sub nom. Ada v. Gov't of Guam*, 179 F.3d 672 (1999).

Thus, the only issue in dispute with respect to determining whether Camacho/Cruz received a majority of votes cast is whether the 504 overvotes should be included in, or excluded from, the base. If the Commission excludes the overvotes, then the base, or pool of votes cast from which the calculation of a majority is made, results in the Camacho/Cruz team receiving 50.25% of the vote. If the Commission includes the 504 overvotes, then the Camacho/Cruz team will have garnered 49.60% of the vote, and in this case, a runoff election would have been required pursuant to the Organic Act.

The overvotes issue was presented to the Commission at its post-election meeting on November 9, 2006. At that time, counsel for the Commission submitted a legal opinion indicating that Guam law found at 3 GCA § 11114 requires that overvotes be excluded from the base for purposes of determining whether Camacho/Cruz garnered a majority of votes cast.

After excluding the overvotes from the base, the Commission certified the results of the election, and declared the Camacho/Cruz slate as the winner of the gubernatorial election.

The instant petition followed.

II.

This court has original jurisdiction over petitions for writs of mandamus pursuant to sections 1424-1(a)(2) and 1424-1(a)(3) of the Organic Act, codified at 48 U.S.C §§ 1424-1(a)(2), (a)(3) (Westlaw through Pub. L. 109-382 (2006)), and 7 GCA § 31202 (2005).

III.

A petitioner bears the burden of showing that a writ should issue. *People of Guam v. Super. Ct. (Bruneman)*, 1998 Guam 24 ¶ 3. The decision of whether to issue a writ of mandamus lies within the discretion of the court. 7 GCA § 31401; *see also Gray v. Super. Ct.*, 1999 Guam 26 ¶ 12.

The primary purpose of a writ of mandamus is to compel the performance of a legal duty. 7 GCA § 31202 ("[A writ of mandate] may be issued by any court . . . to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.") (alterations in original); *see, e.g., A.B. Won Pat Guam Intl Airport Auth. ("GIAA") v. Moylan*, 2005 Guam 5 ¶ 10.

As a general rule, mandamus will not lie to compel the exercise of discretion in a particular manner. *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶12. However, mandamus will issue to compel the performance of a statutorily required ministerial act. *Id.* ¶ 11 (observing that mandamus is appropriate where there is a "clear, present and ministerial duty to act . . . .").

IV.

Petitioners Underwood/Aguon contend that because overvotes should be counted for purposes of determining the base, a writ of mandate must issue ordering the Commission to conduct a runoff election as a result of the failure of any one slate to be "elected by a majority of votes cast," as such term is used in the Organic Act. 48 U.S.C. § 1422. For the

reasons stated below, we deny the instant petition for extraordinary relief.

A. Section 1422 of the Organic Act of Guam

"The Organic Act serves the function of a constitution for Guam." *GIAA*, 2005 Guam 5 ¶ 21 (quoting *Haeuser v. Dept of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); *see also People v. Perez*, 1999 Guam 2 ¶ 115 ("Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution.").

Section 1422 of the Organic Act provides, with respect to the election of the Governor and Lieutenant Governor of Guam:

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people. . . . If no candidate receives a majority of the votes cast in any election, . . . a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

48 U.S.C. § 1422.

Underwood/Aguon primarily rely on the Ninth Circuit case of *Ada v. Government of Guam*, 179 F.3d 672 (1999), in asserting that the phrase "votes cast" as used in the Organic Act necessarily includes overvotes, and for this reason, a runoff election is required. In opposition, Camacho/Cruz assert that the Ninth Circuit case is no longer good law, and more importantly, they contend that local law found at 3 GCA § 11114 defines the phrase "votes cast" to exclude overvotes, and therefore, the local law controls the disposition of the issue before us.

The issue before us is clearly an Organic Act issue. More specifically, we are tasked to consider the statutory

interpretation of the phrase "elected by a majority of the votes cast," as such phrase is used in the Organic Act. To this extent, we disagree with Camacho/Cruz's assertion that our inquiry must begin and end with the local law found at 3 GCA § 11114 (2005). This is because of the "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act." *In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam ("In re Request of Governor Camacho 2004")*, 2004 Guam 10 ¶ 33 (quoting H.R.Rep. No. 105-742 (1998), 1998 WL 658802 at *3); *see also In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam ("In re Request of Governor Camacho 2003")*, 2003 Guam 16 ¶ 15 n.5.

"We underscored this principle in *In re Request of Governor Gutierrez*, when we stated that 'the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act.'" *In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33 (quoting *In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 41).

The Ninth Circuit Court of Appeals also recognizes that Guam's self-government is "constrained by the Organic Act" and therefore, courts are compelled to "invalidate Guam statutes in derogation of the Organic Act." *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); *see also In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33. Thus, the Legislature's powers are broad, but are constrained by the provisions of Organic Act of Guam, and in turn, this court's interpretation of such law. "[T]he court must declare a legislative enactment unconstitutional if an analysis of the

constitutional claim compels such a result." *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41.

Consequently, only after construing the relevant Organic Act language *in its constitutional sense* may we then properly assess the constitutionality of 3 GCA § 11114 and its applicability to the issue before us.

1. Organic Act: "elected by a majority of the votes cast"

In construing the Organic Act provision that requires our Governor and Lieutenant Governor to be "elected by a majority of the votes cast" we find ample guidance in cases from the United States Supreme Court.

To begin with, in 1877, in the case of *County of Cass v. Johnston*, 95 U.S. 360 (1877), the Court established the following basic rule:

> This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to *assent to the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares.

Id. at 369 (emphasis added). The general principle which can be gleaned from this case is that where a voter does not express his will in an election, he assents to those voters who do.

In *Newberry v. United States*, 256 U. S. 232 (1921), the Court again recognized that inherent in the concept of an election is making a final choice of an officer:

> The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced

> nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence — *final choice of an officer* by the duly qualified electors.

Id. at 254 (emphasis added).

Years later in *United States v. Classic*, 313 U. S. 299 (1941), the Court again recognized that an election is an expression of choice: "From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates." *Id.* at 318.

Similarly, in *Foster v. Love*, 522 U.S. 67 (1997), the Supreme Court invalidated a law permitting a primary in Louisiana in which the vote would end in no selection among Congressional candidates. The Court stated with respect to the use of the term "election" in federal statutes: "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make *a final selection* of an officeholder. . . ." *Id.* at 71 (citing Noah Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "the act of choosing a person to fill an office") (emphasis added)). In *Foster*, the Supreme Court clearly pronounced that to "elect" is to "choose."

More recently, in *Bush v. Gore*, *531* U.S. 98 (2000), the Court provided the following direction when it comes to defining a "vote." First, we are instructed that "[i]n certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements." *Id.* at 103. In overturning the Florida Supreme Court's order for a recount on the basis that the recount procedures violated equal protection, the

United States Supreme Court deferred to Florida law in its analysis. *Id.* at 116 (citing *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975) ("The election process . . . is committed to the executive branch of government through duly designated officials all charged with specific duties . . . [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct . . . .") (alterations in original). Thus, under Florida law, the Court determined that a "legal vote" under Florida law is one in which there is a "clear indication of the intent of the voter." *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla. 2000) (quoting Fla. Stats. §§ 101.5614(5)-(6)(2000)), *rev'd by Bush v. Gore*, 531 U.S. 98 (2000).

These pronouncements of the United States Supreme Court are consistent in their views of an election and a vote, and they lend much guidance to the issue before us. Applying the above cases to the issue before us, we hold that in order to determine, in the constitutional sense, whether a gubernatorial slate has been "elected by a majority of the votes cast," only expressions of will or choice, or final selections of an officeholder, may be properly included in the total number of votes cast. More specifically, because the Organic Act concludes that the Governor and Lieutenant Governor be "elected" by a majority, that is, "finally selected" by a majority, it is a logical premise that *the base* from which such majority is determined includes only those votes which would similarly indicate "a final selection of an officeholder," as instructed by the Court in *Foster*, 522 U.S. at 71. *See also Newberry*, 256 U. S. at 250 (describing an election as a "final choice . . . by the duly qualified electors"); *Classic*, 313 U.S. at 318 (characterizing an election as "the expression by qualified electors of their choice of candidates."). Stated another way, those voters who have properly expressed a choice are the same voters

who should make up the base in determining whether, under our Organic Act of Guam, a candidate has been "elected by a majority of the votes cast by the people." 48 U.S.C. § 1422.

Like the voters in *County of Cass*, 95 U.S. 360, the 504 persons who overvoted, or voted for both gubernatorial slates, have not expressed their will in deciding who should be the next Governor and Lieutenant Governor. Accordingly, we hold that the 504 persons who did not express a choice or selection of a Governor and Lieutenant Governor in the November 7, 2006 General Election have assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election.

In so holding, we construe the Organic Act to require that the Governor and Lieutenant Governor of Guam be elected by a "majority of all those who cared to make any choice among gubernatorial candidates." *Gutierrez*, 528 U.S. at 256. To hold otherwise would be to "impute to the Congress a strange preference for making it hard to select a Governor." *Id.* (rejecting the argument that "votes cast" means "ballots cast" because under such an interpretation of section 1422 "the statute could require a runoff . . . even though one slate already had a majority of all those who cared to make any choice among gubernatorial candidates.").

In light of our holding above, we reject Underwood/Aguon's argument that the actual marking of the ballot for both slates is an expression of some sort, either of protest against one team of candidates or of support for another team of candidates. Again looking to the United States Supreme Court for guidance, we are reminded of the familiar case of *Burdick v. Takashi*, 504 U.S. 430 (1992), where the Court stated eloquently that the election process is not meant to be a platform for expression of discontent or some other display. It is meant to choose between candidates:

> [T]he function of the election process is "to winnow out and finally reject all but the chosen candidates," not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.

Id. at 438 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974) (second alteration in original). In other words, while an overvote may presumably stand for voter error or even connote a sense of discontentment with the final choice of candidates, the function of an election is to express one's will in the "selection of an officeholder" and not to express one's discontent.

2. Ninth Circuit Case: *Ada v. Government of Guam*

a. Treatment of Ninth Circuit precedent

It is appropriate at this juncture to discuss the circuitous path that Guam courts have taken in the development of *stare decisis*. To begin with, when the Supreme Court of Guam stood for the first time in 1996 as the first level appellate court of Guam,[1] the pronouncement was made that decisions of its predecessor entity, the District Court of Guam Appellate Division, would be considered non-binding authority. *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4.[2] At

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[1] *See generally* Guam Pub. L. 12-85 (July 1, 1974) ("Court Reorganization Act of 1974"); *Guam v. Olsen*, 431 U.S. 195 (1976); U.S. Pub. L. 98-454 § 709, 98 Slat. 1732 (October 5, 1984); Guam Pub. L. 21-147 (January 14, 1993); Guam Pub. L. 23-34 (June 28, 1995).

[2] In *People v. Quenga*, 1997 Guam 6 ¶ 14 n.4, we stated:

> It may go without saying, but this Court does not recognize the decisions of the Appellate Division as controlling our construction of law. We consider its opinions as precedent that

that time, and until 2004, the Ninth Circuit Court of Appeals retained reviewing jurisdiction over the Supreme Court of Guam on a *certiorari* basis. Our cases were thus reviewable by the Ninth Circuit Court of Appeals as the third step in the path of appellate review ending, as in all states, with the United States Supreme Court. With the historic passage of House Resolution 2400, in 2004, the *certiorari* review period of the Ninth Circuit was terminated, thus putting the Supreme Court of Guam on par with state supreme courts. Pub. L. No. 108-378, 118 Stat. 2206 (codified as amended in sections of 48 U.S.C. chap. 8A) (Oct. 30, 2004).

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is binding upon the trial courts of Guam, but these decisions, like those of the Court of Appeals, are considered persuasive authority when we consider an issue. In providing for a Supreme Court of Guam, Congress adopted a model that puts Guam on a par judicially with the several States, which grants this Court the authority to interpret Guam's laws. The decisions of this Court will be reviewed in due time and course by the Supreme Court of the United States alone. *See* 48 U.SC. §§ 1424-2 (1994) (also providing a period of fifteen (15) years during which the Ninth Circuit Court of Appeals retains certiorari review of this Court's decisions). While we note our authority to modify pre-existing interpretations of our laws that have been determined by federal tribunals, the Appellate Division's opinion in *Herradura* does not present, on its face, any occasion for reconsideration. It appears well supported in law and well reasoned. The Appellant did not invite our attention to *Herradura* as a wrongly decided precedent. It should be underscored that the creation of the Supreme Court of Guam did not erase pre-existing case law. Precedent that was extant when we became operational continues unless and until we address the issues discussed there. We will not divert from such precedents unless reason supports such deviation. We choose to let *Herradura* stand, without our reaching the merits of the issue presented, because we see no reason to reconsider its conclusions.

As previously stated, the issue in the case *sub judice* involves an interpretation of the Organic Act of Guam. The Organic Act has the unique distinction of being Guam's *de facto* constitution, and, at the same time, a federal law. *See generally* 48 U.S.C. chap. 8A. This creates the anomalous situation wherein two separate and independent court systems — the federal and local courts — have original jurisdiction over questions arising under the Organic Act and could conceivably render opposing opinions. While a direct conflict is not likely, and is not the case in this instance, any such conflict between the federal and local court systems in interpreting our *de facto* constitution may be ultimately resolved by this nation's highest tribunal — the United States Supreme Court.

Under the principles of *stare decisis* as they exist in American jurisprudence, we do not regard the termination of the Ninth Circuit review as a termination of the precedential value of cases involving Organic Act issues that rose to the Ninth Circuit through the federal appellate process, as in the instant case, or through the local court appellate process during the Ninth Circuit review period. Rather, Ninth Circuit cases that address Organic Act issues will be binding on the trial courts of Guam to the extent that this court has not addressed such issues. Moreover, Ninth Circuit cases that address Organic Act issues will be followed by this court, insofar as such cases are reasonably supported by law. That is, because the Supreme Court of Guam is now the final arbiter of questions arising through the jurisdiction of the courts of Guam (short of final *certiorari* review by the United States Supreme Court), we recognize our authority to depart from Ninth Circuit cases interpreting the Organic Act of Guam only in the rare instance where we believe that such cases are unsupported by law.

b. The merits of the Ninth Circuit opinion

Underwood/Aguon rely heavily on the Ninth Circuit case of *Ada v. Government of Guam*, 179 F.3d 672, where the court held that "'a majority of the votes cast in any election' means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates." *Id.* at 678. In particular, Underwood/Aguon argue that while the United States Supreme Court reversed the Ninth Circuit opinion, the reversal only spoke to the issue of whether the term "any election" meant the gubernatorial election or the general election. We disagree.

First, the Ninth Circuit court's reference to overvotes was not necessary to the adjudication of the case. We therefore regard it as dicta. Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication. . . ." Michael Sean Quinn, *Argument and Authority* in *Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999) (quoting *Grigsby v. Reib*, 153 S. W. 1124, 1126 (Tex. 1919); *In re Tuttle*, 291 F.3d 1238, 1242 (10th Cir. 2002) (describing dicta as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand.") (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir.1995)). "Such expressions of opinion, not in anywise necessary for the actual decision of any question before the court, are not controlling authorities in any sense, although they may at times have persuasive effect." *State ex rel. Anderson v. Hostetter*, 140 S.W.2d 21, 24 (Mo.1940); *see also Mun. of San Juan v. Rullan*, 318 F.3d 26, 28 n.3 (1st Cir. 2003) ("Dicta — as opposed to a court's holdings — have no

binding effect in subsequent proceedings in the same (or any other) case.") (citation omitted); *Dunn Constr. Co. v. Craig*, *3* So.2d 834, 835 (Miss. 1941) (stating that when an issue "is not before the Court, . . . any opinion expressed thereon is mere dictum not binding on any one."); *Medford v. Bd of Trustees*, 175 P.2d 95, 97 (Kan. 1946) ("Dicta and obiter dicta which go beyond the case may be respected but should not control a judgment in a subsequent case when the precise point is presented, argued and considered by the entire court."); *Buehler v. Bd. of Supervisors*, 183 N.E. 384, 386 (N.Y. 1932) (stating that when a statement made "was not necessary to the decision [it] is not binding upon this court").

The Ninth Circuit *Ada* case, where there were 609 overvotes, clearly was not argued and not decided on the issue of overvotes. 179 F.3d at 675. As stated at oral argument by counsel for Underwood/Aguon, Appellant Gutierrez in *Ada* did not need the 609 votes to prevail in the Ninth Circuit; he needed only the 1,313 blank ballots. Concededly, Appellee Ada needed both the undervotes and the overvotes to secure a runoff, but Ada was the appellee in the Ninth Circuit case, so the overvotes were irrelevant to the Appellee's position and therefore not relevant to the outcome. Therefore, since the 609 votes would not have been determinative in the *Ada* case, it fits squarely into the definition of dicta.

Only holdings that are necessary for the adjudication of a case should be treated as precedent. Quinn, *supra* at 711 (stating that "dicta could be anything not necessary to the resolution of the case"). In addition, while a holding may not address the main issue of the case, but still is necessary to reach a conclusion, then in that case, it also may be treated as precedent. *Id.* This is not the case with the Ninth Circuit's discussion regarding overvotes – overvotes were clearly not necessary to the adjudication of the case before it and the

references to overvotes can accordingly be regarded as dicta. "[I]f a court decides a point of law, after the adversarial parties have raised it and argued it and after the court has thought about it carefully, then it is binding on some range of courts (possibly including the court that decided the point) if it was a matter of some importance in the decided case." *Id.* at 684. Nevertheless, as with the issue of overvotes in *Ada*, when a court's statements are "not necessary to the actual holding of the case," then such "statements are properly considered dicta, and are not binding." *Kool, Mann, Coffee & Co. v. Coffey*, 300 F.3d 340, 355 (3rd Cir. 2002).

Second, we believe that upon review, the United States Supreme Court expressly rejected the Ninth Circuit's rationale which supports the inclusion of overvotes in determining the majority of the votes cast. In particular, the Court expressly rejected the Ninth Circuit's notion that the use of the term "votes cast" in the Organic Act means "ballots cast." *Gutierrez*, 528 U.S. at 255-56. Rather, in construing the phrase "majority of votes cast" in section 1422, the Court stated that when Congress used the term "votes" in the context of "votes cast," it undoubtedly meant "votes" and not "ballots." *Id.* The Court recognized:

> It would be equally odd to think that after repeatedly using "votes" or "vote" to mean an expression of choice for the gubernatorial slate, Congress suddenly used "votes cast in any election" to mean "ballots cast." And yet that is just what would be required if we were to treat the phrase respondents' way, for they read "votes cast in any election" as referring to "ballots containing a vote for any office." Surely a Congress that meant to refer to ballots, midway through a statute repeatedly referring to "votes" for gubernatorial slates, would have said "ballots." To argue otherwise is to tag Congress with an

> extravagant preference for the opaque when the use of a clear adjective or noun would have worked nicely. But even aside from that, Congress has shown that it recognizes the difference between ballots and votes in the very context of Guamanian elections. From 1972 until 1998, 48 U.S.C. § 1712 expressly required that the Guam Delegate be elected "by separate ballot and by a majority of the votes cast for the office of Delegate." There is simply no reason to think that Congress meant "ballots" when it said "votes" in § 1422.

Id. This holding lies directly contrary to the Ninth Circuit opinion wherein the court stated that "[a]dmittedly, this interpretation equates 'votes cast' with 'ballots cast.'" *Ada*, 179 F.3d at 677 n.5.

Importantly, to the extent that the Ninth Circuit's statement regarding overvotes remains viable, we nonetheless conclude that it is unsupported by law. That is, the Ninth Circuit case of *Ada v. Government of Guam* qualifies in this instance as a rare case where, due to unsound reasoning on the part of the Ninth Circuit Court of Appeals as discussed below, we must depart from, and ultimately reject, the Ninth Circuit Court's interpretation of the Organic Act of Guam.

This is because while the United States Supreme Court did not expressly address the issue of overvotes, the *rationale* employed by the Ninth Circuit in concluding that undervotes should be counted to determine the majority of the votes cast is *the very same rationale* used by that court to similarly count overvotes. This rationale, which equates "ballots" with "votes," was expressly overturned by the United States Supreme Court. *See Gutierrez*, 528 U.S. at 255-56.

Moreover, the Ninth Circuit court, in concluding that both undervotes *and* overvotes should be counted in determining whether a gubernatorial team achieved the requisite majority of votes cast, declined to apply the principles pronounced by the Supreme Court in *Cass*, 95 U.S. at 369 ("[T]he established rule as to the effect of elections in the absence of any statutory regulation to the contrary [is that a]ll qualified voters who absent themselves from an election duly called are presumed to *assent to the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares.") (emphasis added). The Ninth Circuit further declined to apply the similar principle found in the Third Circuit case of *Todman v. Boschulte*, 694 F.2d 939 (3d Cir.1982), where the court agreed with a previously announced rule that "voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result." *Id.* at 941 (quoting *Euwema v. Todman*, 8 V.I. 224, 224, 231 (D. VI 1971)). In doing so, the Third Circuit Court also failed to consider the Supreme Court cases which discuss the nature of the "vote" and the purpose of an "election." *See, e.g., Foster*, 522 U.S. at 71 (relying on federal statutes' references to an election as "actions of voters and officials meant to make a final selection of an officeholder"); *Newberry*, 256 U.S. at 250 (describing an election as a "final choice . . . by the duly qualified electors"); *Classic*, 313 U.S. at 318 (characterizing an election as "the expression by qualified electors of their choice of candidates.").

To interpret the relevant Organic Act language as the Ninth Circuit court has, especially in the face of clear guidance by the Supreme Court as to the definition of vote and the purpose of an election, would be to rewrite our

Organic Act, as the Ninth Circuit erroneously did in the *Ada* case. For these reasons, we find that the Ninth Circuit case is unsupported by law, and thus we exercise our aut ıority to depart from, and reject, the Ninth Circuit case to the extent that it has any remaining precedential value subsequent to its reversal by the United States Supreme Court.

3. *Smith* and other cases

Petitioners Underwood/Aguon also rely on the case of *Smith v. Board of Commissioners*, 65 N.W. 956 (Minn. 1896), where the issue was how to calculate a "majority of votes cast" on a referendum to change the county seat. In that case, the court held that unintelligible as well as intelligible ballots must be considered in determining the denominator from which to calculate the 55% majority. *Smith*, however, is of limited precedence because it is a referendum case, and as the Supreme Court in *Gutierrez*, instructs, "[r]eferendums are exceptions to the normal legislative process, and passage of a referendum is not itself essential to the functioning of government." 528 U.S. at 256.

Moreover, when presented with the reasoning in *Smith*, other cases have declined to follow it. For instance, in *State ex rel. Short v. Clausen*, *130* P. 479 (Wash. 1913), on a proposition to issue water bonds, the issue was whether to count unintelligible ballots as well as intelligible ones. There, the court declined to follow *Smith*, 65 N.W. 956, and held that only those ballots which clearly express the voter's choice can count. That case reasoned that only ballots that reflect the voter's choice can be counted as for or against the proposition. 130 P. at 480.

In yet another case, *State ex rel. Consolidated School District v. Smith*, 109 S.W.2d 857 (Mo. 1937), in determining whether undervotes or overvotes would be included in the aggregate number of votes cast in an election to authorize

school board bonds, the court held that both undervotes and overvotes are not included. On the same reasoning we adopt here, since an undervote reflects no choice any more than does an overvote, that neither should be counted. The Missouri court held that the term "votes" required "showing a preference either in the affirmative or negative for the proposition voted on." *Id.* at 858.

However, as pointed out by the Supreme Court in *Gutierrez* in response to the argument that passing a referendum requires a majority of voters going to the polls and not a majority of persons voting in a particular referendum issue: "[T]here is no uniform rule, and even if there were, treatment of referendums would not be a plausible model for elections of officials." 528 U.S. at 256 (citations omitted).

We therefore place no weight on Underwood/Aguon's reliance on the *Smith* case on this issue, primarily because the case involved a referendum, and in the *Gutierrez* case, the Supreme Court has instructed us to deal with referendums differently. *See* 528 U.S. at 256. Beyond that, *Smith* appears to be an anomaly, a case where the determination of a "majority" is simply deviated from by other cases faced with the same issue. *See also Stembredge v. Newton*, 99 S.E.2d 133, 134 (Ga. 1957); *Port of Palm Beach Dist. v. State*, 22 So. 2d 581, 582 (Fla. 1945).

B. Constitutionality of 3 GCA § 11114

Having defined the phrase "elected by a majority of the votes cast" in the constitutional sense, we next consider whether 3 GCA § 11114 (2005) is in conflict with such definition.

An analysis of the constitutionality (or organicity) of a local statute "must begin with the general rule that legislative enactments are presumed to be constitutional." *In re Request*

of Governor Gutierrez, 2002 Guam 114 1; *In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33.

A party challenging the constitutionality of a local law bears the burden of establishing its unconstitutionality. *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41("[H]e who alleges the unconstitutionality of an act bears the burden of proof . . . [and] the validity of acts is to be upheld if at all possible with all doubt resolved in favor of legality and unconstitutionality will be decreed only when no other reasonable alternative presents itself. . . .")

In this case, Underwood/Aguon bears the burden of establishing that 3 GCA § 11114 lies in violation of the Organic Act of Guam.

Title 3 GCA § 11114, entitled "Ballot, Invalid Portions Rejected; Blank Ballots and Improperly Marked Ballots are Not 'Votes Cast' for Calculating a Majority," states:

> If a voter indicates either:
>
> (a) by placing the voter's marks in the voting ovals or other spaces adjacent to the names of any candidates or nominees;
>
> (b) by writing the names of persons for an office in the blank spaces, or
>
> (c) by a combination of both, the choice of more than there are candidates or nominees to be elected or certified for any office, or if for any reason it is impossible to determine the voter's choice for any office, the voter's ballot shall not be counted for that office, but the rest of the voter's ballot, if properly marked, shall be counted. *A ballot that is blank, or that is marked* with *more candidates or nominees than are to be nominated or elected, is not to be included as apart of the base for determining*

> *what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.*

(Emphasis added.)

The above statute clearly requires the Commission to exclude overvotes from the base in its determination of what constitutes a majority in any election,[3] and therefore, we find that section 11114 is not inconsistent with section 1422 of the Organic Act of Guam. In particular, the exclusion of overvotes is not inconsistent with our holding above that "in order to determine, in the constitutional sense, whether a gubernatorial slate has been 'elected by a majority of the votes cast,' only expressions of will or choice, or final

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[3] In fact, most states have enacted legislation which does not al low a vote to be counted if the will of the voter cannot be ascertained. We were reminded of this in *Bush v. Gore,* 531 U.S. 98 (2000), where in his dissent, Justice John Paul Stevens noted that the United States Supreme Court had "never before called into question the substantive standard by which a State determines that a vote has been legally cast." *Id,* at 125. In making this observation, Justice Stevens notes that the majority of states have adopted statutes which "apply either an 'intent of the voter' standard or an 'impossible to determine the elector's choice' standard in ballot recounts." *Id.* at 125-26. He further noted that there were statutes in Arizona, Connecticut, Indiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Texas, Utah, Vermont, Virginia, Washington and Wyoming which will not count votes where the "intent of the voter" cannot be ascertained, and that Alabama, Alaska, Arizona, California, Colorado, Delaware, Idaho, Illinois, Iowa, Maine, Minnesota, Montana, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee and West Virginia all had statutes refusing to count a vote if it is "impossible to determine" the intent of the voter. *Id.* at 124 n.2. At issue in the *Bush v. Gore* case was the Florida statute which defined a vote as "a clear indication of the intent of the voter ." *See Gore v. Harris,* 772 So. 2d 1243 (2000).

selections of an officeholder, may be properly included in the total number of votes cast." *See* ¶ *29.*

Again here, the primary support relied upon by Underwood/Aguon in challenging the above statute is the Ninth Circuit opinion. Because we have declined to follow what is left of the Ninth Circuit opinion, we hold that Petitioners Underwood/Aguon have failed to establish the unconstitutionality of the local law which, as it stands today with respect to the exclusion of overvotes in the determination of a majority of votes cast is not inconsistent with the relevant provision of section 1422 of the Organic Act as defined in the constitutional sense.[4]

V.

We hold that in order to determine whether a gubernatorial slate has been "elected by a majority of the votes cast," as such phrase is used in the Organic Act of Guam, only expressions of will or choice, or final selections of an officeholder, may be properly included in the total number of votes cast. The converse of this rule is that the 504 persons who overvoted, or voted for both gubernatorial slates, have not expressed their will in deciding who should be the next Governor and Lieutenant Governor, and have thereby assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election. Accordingly, we hold that the Organic Act requires that overvotes be excluded by the Commission for

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[4] We also reject Underwood/Aguon's related argument that 3 GCA § 11114 should not be complied with because of the Commission's historical practice of not including overvotes in determining whether a gubernatorial slate has garnered the requisite majority. We agree with Camacho/Cruz that failure to enforce the law in prior elections does not forgive the failure to follow the law in this election.

purposes of determining whether a gubernatorial slate has been "elected by a majority of votes cast."

The Verified Petition for a Writ of Mandamus ordering the Commission to conduct a runoff for failure of the Camacho/Cruz team to be elected by a majority of the votes cast is hereby

DENIED.

APPENDIX B

CABOT MANTANONA LLP
MEMORANDUM

TO: Frederick J. Horecky, Chairman
Guam Election Commission

Gerald A. Taitano, Executive Director
Guam Election Commission

FROM: Cesar C. Cabot, Esq.
Legal Counsel

DATE: November 9, 2006

SUBJECT: Interpretation of the Term "Majority of Votes Cast" Pursuant to the Organic Act of Guam, 48 U.S.C. § 1422 and 3 GCA § 11114(c)

Our office has been instructed to provide the following legal opinion.

I. FACTS

The 2006 General Election was held to elect, among others, the Governor and Lt. Governor of Guam on November 7, 2006. The ballots were duly tabulated and the unofficial results are as follows:

NAME	NO. OF VOTES
a. Camacho-Cruz	19,552
b. Underwood-Aguon	18,688
c. write-in votes	668
d. number of over votes	504
e. number of under votes (blank ballots)	657

II. ISSUE

What shall constitute a "majority of votes cast" pursuant to the Organic Act of Guam (48 U.S.C. § 1422) and 3 GCA § 11114, in determining the requisite number of votes to declare the winner of the Gubernatorial/Lt. Gubernatorial race during the 2006 General Election?

III. APPLICABLE LAW AND DISCUSSION

The Organic Act of Guam, 48 U.S.C. § 1422 (hereafter "Organic Act") provides for the election of the Governor and Lt. Governor, in relevant part, as follows:

> **§ 1422. Governor; Lieutenant Governor: Powers, Duties:**
>
> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam." *The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature* of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. *If no candidate receives a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held* between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes case.***

Title 3 Guam Code Annotated § 11132 entitled "Declaration of Results," provides that "immediately after completion of the tabulation of all election results, the Commission shall declare elected to each office the person

having the largest number of votes for that office." Further, 3 GCA § 11114(c) reads in pertinent part as follows:

> **§ 11114. Ballot, Invalid Portions Rejected; Blank Ballots and Improperly Marked Ballots are Not 'Votes Cast" for Calculating a Majority.**
>
> If a voter indicates either:
>
> (a) by placing the voter's marks in the voting ovals or other spaces adjacent to the names of any candidates or nominees;
>
> (b) by writing the names of persons for an office in the blank spaces, or
>
> (c) by a combination of both, the choice of more than there are candidates or nominees to be elected or certified for any office, or if for any reason it is impossible to determine the voter's choice for any office, the voter's ballot shall not be counted for that office, but the rest of the voter's ballot, if properly marked, shall be counted. *A ballot that is blank, or that is marked with more candidates or nominees than are to be nominated or elected, is not to be included as a part of the base for determining what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.* 3 GCA § 11114 (Emphasis added).[5]

It is important to note that § 11114 was amended by P.L. 25-146 on May 27, 2000, and the instant application of

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[5] **SOURCE**: gc § 2614, as reenacted by P.L. 11-209; amended by P.L. 12-149. Amended by P.L. 25-146.46. **Compiler's note:** The wording of this Section was amended to reflect the holding in *Gutierrez v. Ada*, U.S. Supreme Court, reversing District Court of Guam and 9th Circuit Court of Appeals by a unanimous decision. 000 U.S. 99-51 (2000).

§ 11114(c) is a matter of first impression with the GEC. Applying the relevant sections of the Organic Act, with Sections 11114(c) and 11132, mandates that blank ballots and over-votes are not to be included in determining the requisite majority threshold to be elected.

The Guam Election has repeatedly taken the position that its role is ministerial in nature, and that it is duty bound to administer the laws as it is written. *See* 3 GCA §§ 2102, 2103 and 2106. The GEC was created by the Legislature, and can only exercise powers conferred upon it by the Legislature. 3 GCA § 2101.

As creatures of the Legislature, the GEC has no common law or general powers, but only those conferred upon it by statute. *See Ada v. Guam Telephone Authority*, 1999 Guam, 10, ¶ 11 ("Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.") (quoting *Francis O. Day Co., Inc. v. The West Virginia Reclamation Board of Review*, 424 S.E. 2d 763, 766-766 (W.Va. 1992).

The Guam Election Commission may act only to implement their charter as it is written in and given to them by the Legislature. *Wade v. Taitano*, 2002 Guam 16 ¶ 7. An administrative agency does not have the authority to ignore its own valid rules. *Wade* at ¶ 7.

It is therefore legal counsel's opinion that the GEC is bound to follow Section 11114(c) by deducting the aggregate number of blank ballots and over-votes, from the final tally, in determining the majority required to elect a gubernatorial team during the General Election. In short, blank ballots and

over-votes (ballots marked with more candidates than are to be elected) are not to be included in determining the majority of votes cast required under the Organic Act.

This appears to be in accord with the U.S. Supreme Court's ruling in *Gutierrez v. Ada*, 528 U.S. 250 (2000) (blank ballots excluded from the "votes cast" computation. "There is simply no reason to think that Congress meant 'ballots' when it said 'votes' in § 1422.") *Id.* at 256.

I hope this meets the satisfaction of the Commission. If you have any questions or comments, feel free to contact me.

CESAR C. CABOT

/s/ Cesar C. Cabot
Legal Counsel

CCC:me
MEMORANDUM110906

(2)

No. 06-1268

In The Supreme Court of the United States

ROBERT A. UNDERWOOD
and FRANK B. AGUON, JR.,

Petitioners,

v.

FELIX P. CAMACHO, MICHAEL CRUZ
AND THE GUAM ELECTION COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Guam

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

DAVID A. MAIR *
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A PROFESSIONAL CORPORATION
238 A.F.C. Flores Street
Suite 801 Pacific News Building
Hagatña, Guam 96910
Telephone: (671) 472-2089

Counsel for Respondents Felix P. Camacho and Michael Cruz

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a Guam statute (3 G.C.A. Section 11114) is inconsistent with the Organic Act of Guam, 48 U.S.C. Section 1422, to the extent that it provides that ballots marked with more candidates than are to be elected ("overvotes") must be excluded from the base for determining what constitutes a majority of votes cast.

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JURISDICTION AND OPINION BELOW

Respondents Felix P. Camacho and Michael Cruz (hereinafter "Respondents") adopt and incorporate Petitioners' statements as to jurisdiction and the opinion below.

ADDITIONAL RELEVANT STATUTORY PROVISION

Respondents adopt and incorporate Petitioners' "Statement of Statutes Involved," at least as far as it goes. However, at least one additional statute should also be mentioned. Title 3 of the Guam Code Annotated, section 11111 provides as follows:

> **11111. Imperfectly Marked Ballots Void.** At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is filled with conclusory assertions that mischaracterize the record. For example, Petitioners stated that they "had every reason to expect that the winning candidates would need to earn a majority of all votes cast in the gubernatorial election, including overvotes, since that was the consistent prior practice in Guam." Pet. 4. For several reasons this statement is misleading; and it borders on misrepresentation.

In fact, no one had *any* reason to expect that overvotes would or could be considered for purposes of the majority-vote requirement because Guam's election law was amended six years before the 2006 election to expressly *exclude* overvotes and other spoiled ballots from being so considered. 4 G.C.A. § 11114(c) (West 2005). Since statutes are generally entitled to the presumption of validity, *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979); *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973), Petitioners' contention that the exclusion of overvotes was somehow unexpected is disingenuous at best.

Indeed, the record reflects that the 2006 General Election Ballot itself expressly informed voters, in three separate places, that overvotes would not be counted and that the Sample Ballot was published in the local newspaper prior to the election.[1] Thus, anyone who simply read the Guam statute, the ballot, or even the newspaper, would have known that overvotes would not be treated as "votes cast."[2]

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[1] The instructions on the Gubernatorial election stated, "MARK ONE (1) OVAL ONLY" and "Vote for one (1) team only." *Official General Election Ballot*, ER 8, *Petitioners Robert A. Underwood and Frank B. Aguon, Jr.'s Excerpts of Record* (Nov. 22, 2006). The consequence of disobeying these instructions was explained on the ballot as follows: "If you mark more than one (1) team, *your vote will not be counted*. If you make a mistake, ask for a new ballot." *Id.* (emphasis added). Prior to the election, the ballot at issue was published. It was undisputed that Petitioners made no objection to the form of the ballot at any time prior to the election.

[2] Any objection as to the form of or instructions contained on the ballot were waived by Petitioners' failure to raise them prior to the election. *See e.g., McKinney v. Superior Court of San Diego County*, 124 Cal. App. 4th 951, 21 Cal. Rptr. 3d 773 (2004); *Lewis v. Cayetano*, 834 P.2d 738, 741 (Hawaii 1992).

Equally misleading are Petitioners various additional assertions that, "the Election Commission always treated overvotes as part of the pool of votes for purposes of applying the majority-vote requirement,"[3] and that the Commission "suddenly"[4] decided to "change[] the rules after the election" in 2006.[5] These and multiple similar characterizations about the Commission are completely unsupported by the record.[6]

To the contrary, as the Commission Counsel's November 9, 2006 Opinion put it, the treatment of overvotes was "a matter of first impression with the GEC." Pet. 29a (Appendix B). The Commission had not previously had occasion to apply Section 11114 in this respect because the treatment of overvotes was simply never material to the outcome of a contested race until 2006. In fact, at no point in Guam's history has there been an instance in which a run-off was ordered based on inclusion of overvotes as "votes cast" in an election.[7]

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[3] Pet. at 6.

[4] Pet. at 6.

[5] Pet. at 4, 6.

[6] Petitioners' only citation to the record in this regard is their reference to a footnote of the Guam Supreme Court's Opinion in the case below. Pet. 6, n. 1 (*citing* footnote 4 of the Opinion, reproduced at Pet. 24a). The Guam Supreme Court made no finding concerning the Election Commission's historic treatment of overvotes. The Court's footnote merely referred to, and rejected, Petitioners' argument that such history should control.

[7] In the close 1982 Gubernatorial election, the treatment of overvotes could have affected the outcome of the Gubernatorial election. However, the second-place candidate, Governor Calvo, declined to ask for a run-off and the matter was never addressed either by the Guam Election Commission or the Courts.

It is true that overvotes have always been tabulated as part of the final result. Indeed, not only overvotes but also *undervotes* were tabulated for each office up for vote in the 2006 General Election, just as they have always been, for the purpose of accounting for and reconciling all of the ballots.[8] But counting ballots is not the same thing as determining whether particular ballots count. The Election Commission did not "change the rules" in 2006. In fact, there were no "rules" to change. The treatment of overvotes is governed by statute. The Commission did only what it was legally bound to do – follow the existing law as written. As the Guam Supreme Court noted, agency practice cannot change the law. Pet. 24a, n. 4.

Petitioners' inflammatory language ("suddenly changed the rules") and their observation that overvotes can "be the product of fraud . . . " (Pet. 5), tend to convey the false impression that Election Commission personnel or others might have engaged in misconduct or that there was some other sort of irregularity that affected the outcome of the election or the Commission's treatment of overvotes. In fact, the record is devoid of any such allegation; and neither Petitioners nor anyone else filed an election protest alleging any form of misconduct. Accordingly, Petitioners' subtle suggestions of irregularities should be disregarded.

In any event, contrary to Petitioners' suggestion, the issue here is not Commission practice, it is whether

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[8] *See* ER 2-7, *Petitioners Robert A. Underwood and Frank B. Aguon, Jr.'s Excerpts of Record* (Nov. 22, 2006) (Showing results from 1990-2006).

Section 11114's exclusion of overvotes is somehow inconsistent with the Organic Act.[9] As we shall see, clearly it is not.

SUMMARY OF ARGUMENT

Petitioners' principal legal argument is simply untenable. No "unsettled" legal point is at issue in this case because no state or federal court has ever held that overvotes should be considered "votes cast" for purposes of meeting the majority-vote requirement in a candidate election. To the contrary, courts addressing the issue have uniformly held that overvotes are invalid votes and thus should not be counted for that purpose.

The Guam Supreme Court's ruling in the case below is fully consistent with the authorities; and it is equally consistent with this Court's jurisprudence on voting in general and Guam Gubernatorial elections in particular. The petition for *certiorari* should be denied because Petitioners have failed to show that there is any unsettled

[9] Although the Guam Supreme Court apparently did not deem it necessary to address the matter, Respondents also opposed issuance of a writ of *mandamus* on the ground that Congress, in enacting the Organic Act, had not preempted the Guam Legislature from passing electoral statutes such as Section 11114. *Real Parties' Answer to Pet. for Writ of Mandamus* (Nov. 27, 2006) at pp. 44-46. Specifically, Respondents noted that Congress had not explicitly stated any intent to preempt local law, that the Organic Act's basic provisions for elections left plenty of room for local legislation supplementing it, and that Section 11114, was complementary to, and not inconsistent with, those provisions. *Id., citing, inter alia, City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 440 (2002); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); and *Wisconsin Public Intervener v. Mortier*, 501 U.S. 597, 605 (1991).

issue of law, conflict between the lower courts, or important federal issue sufficient to justify such review.

REASONS FOR DENYING THE PETITION

"[A] petition for writ of *certiorari* will be granted only for compelling reasons." Sup. Ct. R. 10. This case does not meet any of the standards for *certiorari*. The Guam Supreme Court's ruling below was consistent with the overwhelming weight of authority from state and federal courts around the country that have addressed similar issues. The Guam Supreme Court's Opinion did not decide an important question of federal law that has not been but should be settled by this Court; it merely made a routine application of the authorities and precedents from this Court in upholding a Guam statute based on its plain terms. There is no split between the lower courts on any important issue of law. Moreover, the Court did not decide an important federal question in a way that conflicts with the decision of another state court, a federal court of appeals or this Court.

This Court recently acknowledged that decisions of the Supreme Court of Guam are instructive and are entitled to respect when they indicate how statutory issues, including the Organic Act, apply to matters of local concern. Petitioners merely argue that the case below was wrongly decided; and they speculate that the issue could arise and be adjudicated again in the future. What Petitioners have failed to do is explain, in light of this Court's standards for granting *certiorari*, why this Court should undertake to review the matter.

I.

THE GUAM SUPREME COURT'S RULING IS CONSISTENT WITH THE OVERWHELMING WEIGHT OF AUTHORITY ON POINT

This case arose based on conflicting interpretations of the term "votes cast" as used in the Organic Act of Guam. This Court's recent opinion in *Limtiaco v. Camacho*, 549 U.S. ___, No. 06-116 (slip op., March 27, 2007), offers guidance on how such conflicting interpretations are to be resolved.

In *Limtiaco*, the Court looked first to the plain language of the provision in question and then to dictionary and judicial interpretations of that language. *Id.*, at pp. 5-7. As part of that process, the Court looked to a leading treatise on municipal corporations to determine the majority approach to the taxation problem at issue. *Id.*, at pp. 7-8, *citing* 15 E. McQuillin, Law of Municipal Corporations § 41:7, p. 422 (3d ed. rev. 2005). The Court then observed that, "[s]tates that depart from the majority approach use clear language to do so." *Id.*, at p. 7. Because Congress had not used such language in the Organic Act provision at hand, the Court concluded that no departure from the majority approach was warranted.

The Court's analysis in *Limtiaco* applies with equal force to the instant case; and its application leads to the same conclusion. Here, the vast majority of jurisdictions that have addressed the matter have concluded that overvotes or spoiled ballots are not to be considered for purposes of a majority-vote requirement; and "[s]tates that depart from the majority approach use clear language to do so."

A. No State or Federal Court Case Supports Petitioners' Argument

Fundamentally, an election is an expression of "choice of candidates." *United States v. Classic*, 313 U.S. 299, 318 (1941). "[V]oting is the affirmative act of marking the ballot and depositing it in the ballot box in conformity with the election laws." *State ex rel. Cashmore v. Anderson,* 160 Mont. 175, 500 P.2d 921, 929 (1972), *cert. denied,* 410 U.S. 931 (1973). Those who "overvote" simply fail to make an expression of "choice of candidates." Petitioners have still failed to come forward with a single case in which the term "votes cast" was held to include invalid or spoiled votes in a candidate race. Thus, they have failed to make even a threshold showing that their interpretation of the phrase "votes cast" is tenable.

In fact, federal and state court opinions construing statutes with the same or similar language at bar have uniformly concluded that overvotes must be excluded from the determination of whether a candidate has received a majority of the votes cast. For example, a 2004 decision of the Fifth Circuit Court of Appeals explains the folly of counting overvotes (as well as undervotes) for purposes of assigning percentages to candidates in a race:

> Neither over-votes nor under-votes "count" toward determining victory in a race because they represent, respectively, either a "spoiled ballot" or an uncast ballot for that particular race. The ballot remains valid, of course, for those races and only those races in which it was properly marked. But **to use such ballots in the denominator for calculating the percentage of the vote received in a given race, when the votes from those ballots would not have affected the**

> **race, is simply incorrect and results in skewed and inaccurate vote percentages.**

Rodriguez v. Bexar County, Tex., 385 F.3d 853, 861 (5th Cir. 2004) (emphasis added).

Similar rulings excluding overvotes were made in the following cases: *Hornsby v. Hilliard*, 189 So.2d 361, 363 (Fla. 1966) (holding that blank, spoiled and irregular ballots in a school-district millage election were not an expression of a choice and could not be considered in determining whether a specifically proposed millage had received a majority of all votes cast in election); *Wooley v. Sterrett*, 387 S.W.2d 734, 740 (Tex. Civ. App. 1965) (holding that " . . . ballots that do not legally register the will of the voter should not be included in determining a majority."); *Waters v. Gnemi*, 907 So.2d 307, 311 (Miss. 2005) (holding that " . . . a voter cannot legally vote for more than one candidate in the same election, and thus, in the case of an overvote, that ballot, while not totally void as to other elections appearing on the ballot, is not counted for that particular election."); *Stembridge v. Newton,* 99 S.E.2d 133, 134 (Ga. 1957) ("Unintelligible, illegal, and blank ballots should not be counted in computing the number of votes cast in an election, since a ballot cannot become a valid vote unless it conforms to the requirements of law. Therefore, an undecipherable ballot is a mere nullity . . . "); *Port of Palm Beach Dist. v. State*, 22 So.2d 581, 583 (Fla. 1945) ("We think 'votes cast' at an election are choices expressed at that election. There is abundant authority to the effect that ballots registering no preference should be disregarded in determining the result of an election.").

A leading legal treatise sums up the rule commendably: " . . . [B]allots which have been cast, but which because of

their marking or other reason cannot be counted as votes, must be excluded from the aggregate number of votes and not be considered in determining whether the proposition has received the requisite majority unless the statute pursuant to which the proposition is submitted is so worded as to require the consideration of all ballots cast, whether valid or invalid . . . " 29 C.J.S. *Elections* § 397 (1965) at p. 675 (internal citations omitted). *See also* 26 AM.JUR.2D, *Elections* § 379 (2004), at p. 189 ("Blank, illegal, and unintelligible ballots should be rejected in computing the number of votes.").

Likewise, a 1988 Hawaii Attorney General's Opinion concluded that overvotes should *not* be considered for purposes of a county prosecuting-attorney election statute, virtually identical to the provision *sub judice*, requiring the winning candidate to receive "a majority of votes cast."[10] OPPS. ATTY. GEN. HAWAII, OPINION NO. 88-5, 1988 WL 247835 (Sept. 15, 1988).

These authorities and rulings clearly set forth the majority rule that overvotes or spoiled ballots are not to be considered absent express statutory language to the contrary. Adding to the significance of these and other similar rulings is the fact that Petitioners have failed to come forward with any reported contrary rulings in which a court has proceeded to deem overvotes to be votes cast for purposes of a majority-vote requirement in a candidate race.

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[10] The provision, Article VIII, section 8-102 of the Revised Charter of the City and County of Honolulu, as amended in 1986, provides in part: "The candidate receiving a majority of votes cast for the office of the prosecuting attorney shall be deemed elected." OPPS. ATTY. GEN. HAWAII, OPINION NO. 88-5 (Sept. 15, 1988) (emphasis added).

B. Petitioners' Reliance Upon Referendum Statutes is Misplaced

Unable to find cases or authorities supporting their interpretation, Petitioners instead pointed to certain statutes or compacts applied to former territories in which Congress referred to "the majority of legal votes cast," "the majority of valid votes cast," or used similar language. Pet. 5, 16. Petitioners posited that if Congress had intended for "votes cast" to include only *valid* votes it could have used such qualifying language. *Id.* For three reasons Petitioners' argument is less than persuasive.

First, Petitioners mixed proverbial apples and oranges. The provisions Petitioners cited pertain solely to referendums or plebiscites. None of those statutes involved the election of candidates. This is a distinction with a difference. In a similar context this Court expressly stated that "referendums are exceptions to the normal legislative process" and "are not a plausible model for the election of officials." *Gutierrez v. Ada*, 528 U.S. 250, 256 (2000). Accordingly, the Court in *Gutierrez* declined to look to cases involving referendums as persuasive because unlike selecting a governor, "passage of a referendum is not itself essential to the running of the government." *Id.* Petitioners have failed to explain any principled reason why this Court should find referendum cases or statutes any more persuasive in the current context.

Second, even if referendums were an appropriate model, the overwhelming majority rule in referendum cases, as reflected in some of the authorities cited above, is that overvotes should be excluded "unless the statute pursuant to which the proposition is submitted is so worded as to require the consideration of all ballots cast,

whether valid or invalid . . . " 29 C.J.S. *Elections* § 397. Thus, courts presume that "votes cast" means *valid* or *legal* votes cast, unless the controlling statute states otherwise. The statute *sub judice* does not state otherwise.

Third, it is not difficult to show how a statute – any statute – might have been made clearer with the benefit of ingenuity and hindsight. However, two can play at that game. If, as Petitioners maintain, Congress had intended the term "votes cast" to encompass spoiled ballots and invalid votes it could and should have used the terms "ballots cast," or "whether valid or invalid," as some statutes have, and as the authorities generally require in order to accomplish such a result. *See Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89, 98 (Hawaii 1997) (holding that "a majority of ballots cast upon such a question" includes blank ballots and overvotes); *State v. Clausen*, 130 P. 479, 479 (Wash. 1913) (observing that " . . . the decided weight of authority is to the effect that ballots improperly cast or rejected because of illegality or unintelligibility cannot be counted in determining the total vote cast."). Thus, Petitioners' comparison of unrelated and extraordinary referendum statutes falls well short of lending support to their unprecedented interpretation.

C. Petitioners Failed to Show any Congressional Intent to Deviate from the Well-Settled Interpretations of "Votes Cast"

"As always, we begin with the text of the statute." *Limtiaco*, at p. 5. This Court will assume that the legislative purpose of a statute is expressed by the ordinary meaning of the words used in it. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The Court also presumes

that Congress used statutory terms based on their judicially-established meaning, in the absence of a statement to the contrary. *United States v. Merriam*, 263 U.S. 179, 187 (1923). As we have seen, the authorities leave no doubt that the term "votes cast" means *valid* votes cast, and excludes spoiled ballots.

Petitioners proclaimed that the plain wording of the Organic Act provision at issue supports their proposed treatment of overvotes. Pet. 16. Yet Petitioners carefully avoided judicial interpretations of the terms "vote" or "votes cast." Instead, they undertook to interpret words not even found in the Organic Act. Specifically, Petitioners relied on *Black's Law Dictionary*, and no other authority, for the dubious proposition that a "spoiled ballot" is a "vote." Pet. 16. This novel attempt at statutory construction falls rather wide of the mark. Petitioners cannot avoid the weight of authority construing "votes cast" to exclude overvotes by focusing on another term not even used in the statute.

Black's Law Dictionary does not define the term "votes cast," but it does define "vote" to mean, "Suffrage; the expression of one's will, preference or choice . . . " *Id.* (6th ed. 1990). This common-sense definition is completely consistent with the Guam Supreme Court's holding that, " . . . only expressions of will or choice, or final selections of an office holder, may be properly included in the total number of votes cast." Pet. 25a. Petitioners fail to point to any authority that supports the proposition that an overvote or spoiled ballot amounts to an expression of one's will, preference or choice.

Instead of seeking to define terms actually used in the Organic Act, Petitioners engaged in a discussion about the

relevant Congressional debate in an apparent attempt to show that the legislative history of the Act favors a construction contrary to the Guam Supreme Court's ruling. Nothing set forth by Petitioners, however, manifests any intent by Congress to depart from the well-settled judicial interpretation of the terms "vote" or "votes cast" to exclude spoiled or invalid ballots. As this Court has phrased the matter in a similar context, the "fragments of legislative history cited by [Petitioners], regardless of how liberally they are construed, do not amount to a clearly-expressed legislative intent contrary to the plain language of the statute." *American Tobacco*, 456 U.S. at 75; *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'" *Rodriguez v. U.S.*, 480 U.S. 522, 526 (1987); *Aaron v. SEC,* 446 U.S. 680, 695 (1980) (*quoting Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 214, n. 33 (1976)).

Moreover, Petitioners failed to recognize that Congress has effectively ratified the command of Guam statutory law, that " . . . any ballot which is not marked as provided by law shall be void . . . " 3 G.C.A. § 11111. That provision of Guam election law was on the books at the time when the Organic Act still provided that Congress' failure to vacate Guam statutes amounted to Congressional approval of them. *See Ramsey v. Chaco*, 549 F.2d 1335, 1338 (9th Cir. 1977) ("Prior to amendment in 1968, . . . the Organic Act also provided that . . . unless Congress acted to annul the law within one year, it was deemed to

have congressional approval."); *citing* Guam Organic Act § 19, ch. 512, § 19, 64 Stat. 389 (1950), as amended 48 U.S.C. § 1423i. By failing to vacate Section 11111, Congress has endorsed Guam's treatment of "imperfect ballots" as "void."

II.

THE GUAM SUPREME COURT'S RULING IS CONSISTENT WITH THIS COURT'S RULINGS

The Guam Supreme Court's ruling that overvotes must be excluded from the "votes cast" calculation is fully consistent with the holding of this Court in *Gutierrez v. Ada*. In *Gutierrez*, the Court rejected the notion that the Organic Act's use of the term "votes cast" meant "ballots cast." But that was hardly the end of the Court's analysis. After carefully examining the language and legislative history of the provision, the Court also observed that "it would not make any apparent sense" to require a run-off "when those who expressed any preference among candidates had already given a majority to one of them." *Id.* at 256-257. The same reasoning explains why overvotes should not be included within the phrase "votes cast," because voters who "overvoted" – like those who undervoted – simply cannot be categorized as "those who expressed any preference among candidates."

That conclusion is consistent with this Court's prior ruling that to cast a vote is to make a "final choice of an officer." *Newberry v. United States*, 256 U.S. 232, 250 (1921). A voter makes no such final choice when he or she votes for both candidates when instructed to vote for just one. Stated differently, voters who in this instance darkened ovals for both the Camacho and Underwood teams in

the Guam General Election simply did not make the required "expression ... of their choice of candidates." *U.S. v. Classic*, 313 U.S. 299, 318 (1941). Thus, "it would not make any apparent sense" to count *overvotes* in calculating a majority any more than it would to count undervotes. In each case, the voter has failed to record a valid vote for any particular candidate.

In *Gutierrez*, this Court also stated that allowing those not casting a vote for a particular candidate to figure into the majority equation would "impute to Congress a strange preference for making it hard to select a governor." *Id.* at 256. The Court further observed that, "[o]n respondents' reading, the statute could require a runoff (as it would in this case) even though one slate already had a majority of all those who cared to make any choice among gubernatorial candidates." *Id.* at 256. The identical concerns apply to the counting of *overvotes*. To hold otherwise would "impute to Congress a strange preference for making it hard to select a governor" because such a holding would effectively allow spoiled votes to frustrate the will of those who made a single, valid choice.[11]

Thus, while this Court in *Gutierrez* did not expressly address the subject of overvotes, it left no doubt that it makes no sense to take into account the actions of those

[11] Under Petitioners' theory, a group of disgruntled voters could attempt to frustrate the will of those making a choice for Governor by intentionally casting overvotes in each General Election and each subsequent runoff. The Organic Act requires a majority "in any election." Thus, if overvotes were accorded the dignity of "votes cast" one can envision *seriatim* runoffs, in which a determined few systematically impede the vast majority from orderly electing a governor.

who failed to express a preference among candidates.[12] Petitioners' argument that overvotes should be treated as "votes cast" is not only unsupported by the authorities, it is fundamentally inconsistent with this Court's reasoning and ruling in *Gutierrez*.

In contrast, the Guam Supreme Court's ruling in the case below is fully consistent not only with *Gutierrez*, but also with earlier rulings from this Court concerning the nature and treatment of votes in various contexts. In addressing the issues, the Guam Supreme Court found "ample guidance in cases from the United States Supreme Court." *Id.* at ¶ 23. Indeed, the foundation of the Guam court's Opinion was its historical analysis of this Court's election jurisprudence dating from *County of Cass v. Johnson*, 95 U.S. 360 (1877), to *Bush v. Gore*, 531 U.S. 98 (2000).

Petitioners claim that the Guam Supreme Court (as well as the Guam Legislature and the Election Commission) "misread" *Gutierrez*. Yet Petitioners stop well short of furnishing any contrary reading of *Gutierrez* that actually supports their theory. Instead they merely state that *Gutierrez* is "silent" on the matter. Pet. 14. In fact, Petitioners do not claim that any other decision of this Court actually endorses their interpretation of "votes cast." Accordingly, they do not and cannot claim, as a basis for

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[12] "Overvotes" were not at issue in the *Gutierrez* case because, overvotes were immaterial to the outcome of the 1998 election and also because Guam had not yet enacted the 2000 amendments expressly prohibiting the counting of overvotes as "votes cast." Certainly, nothing in the Court's Opinion could possibly be construed as holding such legislation Inorganic for the simple reason that the precise statute in question did not yet exist.

granting *certiorari*, that the Guam Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10(c).

Petitioners faulted the Guam Supreme Court's Opinion on the ground that it failed to address the matter of write-in votes, noting that "all 668 write-in votes in the 2006 gubernatorial election were included in the vote base, regardless of their content." Pet. 19. Yet Petitioners neglected to mention that they never raised the treatment of write-in votes as an issue in the case below. The reason Petitioners never raised the issue is mathematical. Even if all of those write-in ballots were to be examined and somehow resolved to instead be Underwood-Aguon votes, the Camacho-Cruz team would still have enjoyed a majority of some 192 votes.[13] More importantly, since all of those 668 ballots were already included in the base of "votes cast," invalidation of any of those ballots for any reason would only have increased the percentages attributable to the candidate-teams that did appear on the ballot, thereby increasing the Camacho-Cruz majority.

[13] Not all ballots containing write-in selections were designated "write-in votes." Ballots expressing a write-in selection as well as a selection for one or more of the listed candidates were automatically treated as "overvotes," and comprised part of the 504 overvotes recorded by the Commission.

III.

THE RISK OF POSSIBLE FUTURE ELECTION DISPUTES DOES NOT SUPPORT GRANTING *CERTIORARI*

A. Speculation About Future Challenges does Not Justify Granting *Certiorari*

Petitioners assert that this case presents a "... significant and recurring question that this Court should resolve." Pet. 10. Yet nothing but speculation supports such a contention – certainly history does not. Overvotes were "irrelevant" to the dispute over the 1998 Guam election. Pet. 16a. In fact, this litigation marks the first time that anyone has actually brought suit over the treatment of overvotes under either the Guam or Virgin Islands Organic Acts. The most Petitioners can muster in this regard is the assertion that the overvote issue was "nearly" implicated after the 2006 Virgin Islands Governor's race. Pet. 11. That an issue "nearly" came up hardly serves as persuasive evidence of any compelling need to address it now. Indeed, the fact that overvotes were *not* pivotal despite the closeness of the 2006 Virgin Islands contest only serves to illustrate just how infrequently the treatment of overvotes makes any material difference in the electoral outcome.

It is admittedly possible that an aggrieved candidate could seek to litigate this issue again at some point. However, such an eventuality is far less likely than Petitioners would have the Court suppose. First, the matter simply cannot arise again until 2010 at the earliest – for that is the next time that the voters of Guam and the Virgin Islands will go to the polls to elect a governor. Second, the issue cannot arise unless and until there is

another Gubernatorial race in which margin of victory is sufficiently narrow that the outcome depends solely on treatment of overvotes. History shows that to be a rare occurrence. Third, even if such an event were to come to pass, at some uncertain point in the future, there would be no lawsuit, and thus no controversy, unless an aggrieved party should find it worthwhile to file one. It could well be that a candidate on the short end of such an electoral outcome – persuaded by the clarity of the Guam Supreme Court's ruling or weary of waging another campaign after losing the first time around – would deem it preferable to concede and move on.

This Court sometimes grants *certiorari* in order to address conflicting rulings made by the lower courts. That is the reason this Court undertook to review the lower court's ruling in *Gutierrez*. *Id.*, 528 U.S. at 254. As we have seen, however, in this case there are no conflicting rulings. Petitioners argue that one day there might be a conflicting ruling. If and when that day comes, *certiorari* might be appropriate. The mere possibility of a future dispute and future inconsistent ruling, however, hardly justifies the extraordinary step of granting *certiorari* at the present time.

Petitioners spoke about the supposed need for guidance from this Court in order to avoid "another electoral crisis." Pet. 15. Yet there is nothing in the record to suggest that any "crisis" ensued in the aftermath of the 2006 Gubernatorial Election. There is likewise no reason to suppose that any future electoral challenge could not be effectively managed by the local and federal courts sitting in Guam. In the local court system, such a suit would be bound for summary dismissal because the Supreme Court of Guam has definitively ruled on this subject. Any suit

maintained in the federal system would be handled in an expedited manner pursuant to existing rules of procedure which, in the face of similar and even greater challenges, have proven quite sufficient to enable courts to avoid crises and to safeguard the rights of the parties.

B. The Guam Supreme Court's Ruling Provides Guidance and is Entitled to Due Deference

As further purported justification for granting *certiorari*, Petitioners maintain that the Guam Supreme Court's ruling in the case below would not be binding in the event a future challenge were to be brought in the federal court system. While it is true that Guam Supreme Court rulings are not binding as to Organic Act issues, the federal courts have nevertheless accorded due deference to such rulings in view of the unique role the Guam high court plays in shaping interpretations of the Organic Act. *See Guam v. Guerrero*, 290 F.3d 1210, 1213-1214 (9th Cir. 2002); *Gutierrez v. Pangelinan*, 276 F.3d 539, 547 (9th Cir. 2002) ("The Congressional promise of independent institutions of government would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act.").

In *Limtiaco*, this Court recognized that, " . . . decisions of the Supreme Court of Guam, as with other territorial courts, are instructive and are entitled to respect when they indicate how statutory issues, including the Organic Act, apply to matters of local concern." *Id.*, at p. 8. In making this observation, the Court took note of its historic deference to territorial courts over matters of purely local concern. *Id., citing Pernell v. Southall Realty*, 416 U.S.

363, 366 (1974). The Court nevertheless reversed the Guam Supreme Court ruling at issue in *Limtiaco* because it reasoned that the Court is bound to construe to Organic Act "according to its terms" and, moreover, because the issue then before the Court was not purely of local concern. *Id.* However, these considerations do not militate in favor of reviewing the Guam Supreme Court's ruling in the instant case.

First, as we have seen, the Guam Supreme Court clearly interpreted the Organic Act "according to its terms." Only a strained interpretation of the statutory language would support the view of overvotes being advanced by Petitioners in this case.

Second, determining whether or not overvotes are to be considered in Guam gubernatorial elections *is* purely a matter of local concern. Guam has, by statute, adopted rules and procedures for conducting its elections, one of which governs the treatment of overvotes. 3 G.C.A. § 11114(c). In cases involving legislation or rules adopted in the District of Columbia, this Court has generally deferred to the rulings of the courts of the District, deeming such matters to be purely of local concern. As stated in *Pernell*, "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell*, 416 U.S. at 366-367.

Thus, in *Griffin v. United States*, 336 U.S. 704, 717-718 (1949), the Court held that "formulation of rules of evidence for the District of Columbia is a matter purely of local law to be determined – in the absence of specific Congressional legislation – by the highest appellate court

for the District." Likewise, in *Fisher v. United States*, 328 U.S. 463, 476 (1946), the Court held that "[m]atters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed."

The Guam Organic Act does not even begin to direct Guam's officials on the myriad of details inherent in the endeavor of conducting an election or counting ballots. On Guam, as everywhere else in the nation, such details are matters of local governance, left to the states and territories even when federal offices are included on the ballot. *See, e.g., Bush v. Gore*, 531 U.S. at 116. Here, the Guam Legislature has fashioned and the Guam Supreme Court has upheld a rule of law governing the treatment of overvotes that is not inconsistent with any specific term of the Organic Act or any Constitutional provision. It is just the sort of "purely local" matter for which deference is due.

Unlike in *Limtiaco*, where the Court observed that, "[t]he debt-limitation provision protects both Guamanians and the United States from the potential consequences of territorial insolvency[,]" the treatment of overvotes in Guam has only the most remote and attenuated connection to either territorial solvency or any other conceivable matter of nationwide application. Whether or not Guam gubernatorial candidates must contest a run-off election is hardly a matter of national concern. Thus, while the Organic Act is concededly a federal statute, the Guam Supreme Court's ruling on the overvotes issue is nevertheless "instructive" and would be "entitled to respect" by a federal court that might one day be called upon to revisit the issue.

Petitioners overstated the matter when they complained that the Guam Supreme Court's ruling leaves the matter "unsettled." The matter is, at least for now, settled; and the Petitioners have furnished the Court no principled rationale justifying any reexamination of the matter at this time.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition should be denied.

Dated this 13th day of April, 2007.

Respectfully submitted,

DAVID A. MAIR*
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A PROFESSIONAL CORPORATION

Counsel for Respondents
Felix P. Camacho and Michael Cruz

**Counsel of Record*

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No. 06-1268

IN THE

Supreme Court of the United States

ROBERT A. UNDERWOOD AND FRANK B. AGUON, JR.,
Petitioners,

v.

FELIX P. CAMACHO, MICHAEL CRUZ, AND THE GUAM ELECTION COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Guam

REPLY BRIEF OF PETITIONERS

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioners

*Counsel of Record

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REPLY BRIEF OF PETITIONERS

Respondents fail to offer a persuasive defense of Guam's decision to alter its prior interpretation of congressional intent concerning whether the statutory term "votes cast," used in section 1422 of the Guam Organic Act to define the votes included in the majority-vote pool, includes "votes cast" *improperly*. The plain language, legislative history, and policy of the Act provide no definitive answer, but each points in favor of including overvotes in the pool of votes of which a candidate must win a majority. These indications of congressional intent are buttressed by the fact that Congress has repeatedly shown that it knows how to create a majority-vote requirement excluding votes cast invalidly — when that is its intent. Respondents' primary argument is that the weight of the case law points the other way, but that claim does not withstand a review of the cases cited.

Given all these reasons to conclude that the decision below misinterpreted congressional intent, as well as all the evidence that Guam's change of course resulted from an overreaction to this Court's analysis of a completely distinct statutory issue in *Gutierrez v. Ada*, 528 U.S. 250 (2000) ("*Gutierrez*"), a grant of review would be highly advisable. Because the question presented is one of federal law, and since no Article III court has yet to review the decision below, there is every reason to anticipate that when it next arises (in Guam or the Virgin Islands) it will be litigated in a federal court that may reach a result diametrically opposed to that reached here. The Court should not lightly choose to leave in place this degree of uncertainty about the basic rules of an election process, particularly since recent history suggests that very close contests arise in these territories in nearly every election.

1. Apparently unwilling to live with the actual facts relevant to the issues at hand, respondents resort to

accusations that the petition is "disingenuous at best" and borders on "misrepresentation." Br. in Opp. at 1-2. But the facts support what petitioners have said. Until this election, the Guam Election Commission ("Election Commission") consistently included overvotes in the denominator used to determine if candidates received a majority of "votes cast" under the Guam Organic Act, 48 U.S.C. § 1422. It did so even though it sometimes excluded undervotes (as this Court ultimately ruled in *Gutierrez* that it should). These facts are supported by the rulings on the 1998 gubernatorial election. *See Gutierrez*, 528 U.S. at 252; *Ada v. Government of Guam*, 179 F.3d 672, 675 (9th Cir. 1999) ("Write-in ballots and overvoted ballots were included in the total from which a majority was determined.") *rev'd on other grounds*, 528 U.S. 250 (2000); *Ada v. Government of Guam*, No. Civ. 98-66, 1998 WL 1118593, at *1 (D. Guam Dec. 9, 1998) (summarizing the Election Commission's certification of election results which included overvotes in the base but excluded undervotes) *aff'd*, 179 F.3d 672 (9th Cir. 1999). The same facts were accepted by the Supreme Court of Guam here. Pet. App. 24a n.4.[1] So the question remains why the practice changed suddenly in this election. As we

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[1] Respondents claim that the Supreme Court of Guam "made no finding concerning the Election Commission's historic treatment of overvotes." Br. in Opp. at 3 n.6. A plain reading of the opinion shows beyond cavil the court's acceptance of the factual premise that the Election Commission's past practice was to include overvotes in the vote pool. Pet. App. 24a n.4. Nor is it accurate to say that the Election Commission called "the treatment of overvotes" a "matter of first impression" in this case. Br. in Opp. at 3. The quoted language referred only to the first-time analysis of the new local statute, Title 3 of the Guam Code Annotated, section 11114 (enacted after the 1998 election), which was indeed a matter of first impression. Pet. App. 28a-29a ("It is important to note that § 11114 was amended by P.L. 25-146 on May 27, 2000, and *the instant application of § 11114(c) is a matter of first impression* with the [Election Commission].") (emphasis added).

have shown, it is apparent that the Election Commission reversed course as part of a chain reaction of misreadings of, and overreactions to, *Gutierrez*. Pet. 4, 7-14.

2. Attempting to avoid review by arguing the merits, respondents adopt two strategies. First, they conflate the question whether a vote should be tallied in favor of a given candidate with the question whether a vote should be part of the majority-vote pool. Thus, they note that the ballot warned that "overvotes would not be counted," and draw the conclusion that voters "would have known that overvotes would not be treated as 'votes cast'" for purposes of the majority-vote requirement. Br. in Opp. at 2. But warnings about what votes will "count" for candidates say nothing about whether invalid votes are "votes cast" properly included in the denominator in the majority-vote calculation.[2]

Second, respondents strive to portray existing case law as supporting the ruling below. They emphasize that petitioners have "failed to come forward with a single case in which the term 'votes cast' was held to include invalid and spoiled votes *in a candidate race*." Br. in Opp. 8 (emphasis added). In so doing, they carefully add the qualification relating to "candidate" races because, as they acknowledge, *id.* at 11-12, the cases in the referendum context goes both ways.

Then, respondents provide a list of cases they say support their view "that overvotes must be excluded from the determination of whether a *candidate* has received a majority of the votes cast." *Id.* at 8 (emphasis added). Remarkably,

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[2] The same flawed argument is implicit in the discussion of the fact that Congress is deemed to have ratified 3 G.C.A. § 11111, which states that any ballot "not marked as provided by law shall be void." That statute clearly speaks only to the question whether a vote will be counted for a given candidate. (Otherwise there would have been no need to pass 3 G.C.A. § 11114 addressing overvotes and the majority-vote calculation.) Any congressional ratification of section 11111 is therefore irrelevant.

however, having carefully excluded referendum cases from consideration, respondents supply a list of cases *most of which are referendum cases*. *Id.* at 9 (citing to *Hornsby v. Hilliard*, 189 So. 2d 361, 361-62 (Fla. 1966); *Wooley v. Sterrett*, 387 S.W.2d 734, 739-40 (Tex. Civ. App. 1965); *Stembridge v. Newton*, 99 S.E.2d 133, 133 (Ga. 1957); *Port of Palm Beach Dist. v. State*, 22 So. 2d 581 (Fla. 1945)).[3]

If that were not bad enough, two pages later, respondents criticize *petitioners'* reliance on statutes in which Congress has specified that the majority-vote pool is limited to "valid votes cast." Responding to petitioners' argument that these statutes counsel against finding a "valid votes" limitation implicit in the Organic Act, respondents contend that these statutes provide no basis for divining congressional intent here *because they are referendum statutes*. Br. in Opp. at 11 ("Petitioners have failed to explain any principled reason why this Court should find referendum cases or statutes . . . persuasive in the current context.")

Respondents cannot have it both ways, clandestinely relying on referendum cases that help them while rejecting as irrelevant those that do not. Referendum laws are indeed different, for two reasons. First, as the Court suggested in *Gutierrez*, there is no need for a winner in a referendum context, so a more onerous majority-vote test including

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[3] The other two cases that respondents cite are even less relevant. *Rodriguez v. Bexar County*, 385 F.3d 853, 861 (5th Cir. 2004), the case respondents highlight (Br. in Opp. at 8-9) involved the question whether overvotes should be included in an expert analysis in a case under section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Obviously, in assessing the electoral performance of a particular minority district in elections where there was no majority-vote requirement, overvotes are irrelevant, but that says nothing about the instant case. The passage from *Waters v. Gneimi*, 907 So. 2d 307, 311 (Miss. 2005) (cited at Br. in Opp. at 9), is dictum. Moreover, it is far from clear what the court meant to say in indicating that "overvotes are not "counted" for a particular election.

overvotes in the pool might be said to make sense. 528 U.S. at 256. On the other hand, because the choice in a referendum situation is binary — yes or no — including overvotes in the majority-vote pool in that setting has the effect of treating them the same as valid "no" votes. As one court explained:

> There were but two choices in the election here. If we were to hold that the bonds must be approved by a majority of the total of ballots indicating a choice and those indicating none, it would be the equivalent of deciding that the latter, not having indicated approval, should be considered as showing disapproval.

Port of Palm Beach Dist. v. State, 22 So. 2d 581, 583 (Fla. 1945). By contrast, in the 2006 Guam gubernatorial election, the choice was not binary because voters could write in anyone.[4] Moreover, in such a candidate contest, there is no way to know in advance which candidate would be helped by including overvotes in the majority-vote pool.

But the one area in which referendum statutes are completely apposite is in determining what Congress has said in the past when it has wanted to restrict a majority-vote pool to legal or valid votes and screen out overvotes. The fact that it has done so expressly is highly significant when it comes

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[4] Respondents, like the Supreme Court of Guam, fail to explain how the court's own definition of a "vote cast" allows write-in votes in the vote pool but not overvotes. Instead, respondents attempt to cloud the point by offering (incorrectly) that petitioners "never raised" the issue below. Br. in Opp. at 18. Write-in votes — even if classifiable as illegitimate (for a fictional character) or illegal (for an ineligible candidate) — *are* "votes cast" and should be part of the vote base. The Election Commission evidently agrees. Overvotes should be treated the same way. Neither respondents, nor the Supreme Court of Guam, nor the Election Commission offer a reason for disparate treatment. Pet. 19-20.

to interpreting a law that just refers to "votes cast" without excluding votes cast improperly.

Sidestepping, respondents cite a Hawaii statute in which the term "ballots cast" was used and say Congress could have been even clearer in section 1422 by using that phrase. Br. in Opp. at 12. That may be so.[5] But it does not explain why under section 1422 the vote pool should not include all *votes* — including overvotes — rather than only *valid* or *legal* votes. Congress's history of making that choice expressly argues against judicial recognition of such an implied limitation.

In the end, despite respondents' overblown claims, neither side has cited a non-referendum case directly on point. But given the laws where Congress expressly excluded overvotes, and the fact that petitioners' reading better comports with plain English (Pet. 16 & n.7, quoting *Black's Law Dictionary* definitions of "spoiled ballot" and "unintelligible vote"),[6] respondents' efforts to defeat review by arguing the merits are far from compelling.

3. Respondents go on to argue that the ruling below is consistent with *Gutierrez*. Br. in Opp. at 15. Defending the

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[5] It bears mentioning, however, that if Congress opted for "ballots cast" language in section 1422, undervotes as well as overvotes would likely be included in the vote base, meaning the difference between "votes cast" and "ballots cast" is not simply one of clarification or amplification. It would have real impact that Congress may not want.

[6] Additionally, an "illegal vote" is a "*vote* that does not count because it was *cast* by someone not entitled to vote or for an ineligible choice, or in a form or manner that does not comply with the applicable rules." *Black's Law Dictionary* 1607 (8th ed. 2004). A "simple majority" is "[a] majority of the members who vote, a quorum being present, disregarding absent members, members who are present but do not vote, blanks, and abstentions" (*id.* at 975) but *not* disregarding those who overvote or cast illegal or unintelligible ballots.

ruling below as "consistent" with *Gutierrez* is beside the point.[7] After all, it was petitioners who pointed out that *Gutierrez* says nothing about whether overvotes are "votes cast" for purposes of the Organic Act's majority-vote requirement. Pet. 4, 13-14. *Gutierrez* dealt only with the question whether the statutory phrase "in any election" required inclusion in the vote pool of people who did not participate in the gubernatorial election *at all*, just because they voted in another election the same day.

Nor is the Supreme Court of Guam's decision "consistent" with *Gutierrez* insofar as it leads to an ultimate winner faster than if a runoff is held. Br. in Opp. at 16. Congress specifically chose a majority-vote requirement rather than the less rigorous plurality standard understanding expedience was not its virtue. Pet. 21-23.[8]

4. Respondents also say there is no need for a definitive resolution of this issue now, pointing out that the district court can address the issue on an expedited basis when it next arises. Br. in Opp. at 20-21. But that misses the point. There is manifest value in having electoral rules be clear and indisputable before an election is held — so candidates know what they are trying to do and the election does not end up entangled in emergency litigation. That can only happen if the Court grants review here.

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[7] Respondents likewise claim the Supreme Court of Guam's decision comports with selected off-point case law. Br. in Opp. at 15-17. The inapplicability of those cases — which are the same cases the Supreme Court of Guam selected in patching together its definition of "votes cast" — was demonstrated in petitioners' opening brief. Pet. 18-20.

[8] Respondents' foreboding of perpetual runoffs incorrectly assumes that section 1422 requires a candidate to receive a "majority of votes cast," not just in a general election, but also in the runoff election. Br. in Opp. at 16 n.11.

Respondents minimize the importance of entering the next gubernatorial election with clear rules, claiming close-call elections are rare. Yet the meaning of section 1422 in these situations has been implicated in two of the three most recent Guam elections. Moreover, what is and is not a "vote cast" also impacts the Virgin Islands and its identical statute. And that territory was itself only a few steps away from facing these very questions in its most recent gubernatorial contest. Respondents' supposed doubts about whether the question presented would be litigated again (Br. in Opp. at 20) are dubious when one recalls that it was Respondent Camacho who initiated the previous section 1422 litigation. *See Gutierrez*.[9] This is an issue over which the Supreme Court of Guam does not hold the final word. History shows it will be litigated again at the next opportunity.

Similarly, even if respondents are correct in claiming that the benefits of clarifying section 1422's meaning will only reach Guam, that is not an appropriate basis to deny review. This Court has frequently reviewed territorial matters recognizing that resolution was directly significant to only the territory at issue. *See, e.g., Territory of Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959) (granting review "in view of the fiscal importance of the question to [the territory of] Alaska"); *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543, 544 (1940) ("The question here in controversy is a matter of great importance to Puerto Rico . . . ."). That is because the Court understood the importance of the issues presented to the people and governance of those territories. That importance is particularly pronounced and meritorious of this Court's attention where, as here, the question presented is one of federal law and the ruling below has not been reviewed by an Article III court.

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[9] In that litigation, Respondent Camacho did not contest the Election Commission's inclusion of overvotes in the vote base.

5. Finally, respondents' plea for deference to the Guam Supreme Court's reading of the Act is misplaced. Br. in Opp. at 21. Respondent Camacho very recently argued the same point unsuccessfully in *Limtiaco v. Camacho*, 549 U.S. ___, 127 S. Ct. 1413, 1420 (2007) ("Finally, the Governor mistakenly argues that we owe deference to the Guam Supreme Court's interpretation of its Organic Act."). The deference argument is no stronger here. The Organic Act remains a federal statute — one that this Court is "bound to construe according to its terms" (*id.*) — and the issue remains the intent of Congress.[10]

The Court in *Limtiaco* did allow that "[i]t may be true that we accord deference to territorial courts over matters of *purely* local concern." *Id.* (emphasis added). Just as territorial solvency (in *Limtiaco*) is not just Guam's concern, neither is its governance. Respondents nevertheless seize on that qualified and narrow exception and cite Guam's "rules and procedures for conducting its elections" in claiming that Guam's governance is "purely a matter of local concern." Br. in Opp. at 22. But Guam's enactment of provisions governing the mechanics of the gubernatorial election does not render *this* dispute "purely local." The issue here is not the meaning of any Guam statute. It is whether the Election Commission's enforcement of one of those provisions (3 G.C.A. § 11114) was proper under section 1422 of the Organic Act. Guam's Legislature, Election Commission and Supreme Court do not have the discretion to revise section 1422's "majority of votes cast" requirement — and then avoid review by an Article III court when challenged. *See Limtiaco*, 127 S. Ct. at 1419 n.2 ("Guam's territorial

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[10] Petitioners do not, as respondents' claim, adduce section 1422's legislative history to advocate a reading of that section "contrary to [its] plain language." Br. in Opp. at 14. The legislative history behind section 1422 *supports* its plain language reading. Pet. 21-23.

legislature cannot redefine terms used in a federal statute"). Deference is particularly unwarranted since the Supreme Court of Guam based its novel definition of "votes cast" primarily on rulings of this Court. Pet. App. 8a-12a.

None of the cases respondents press to avoid this Court's review of the Supreme Court of Guam's ruling suggest deference is warranted. *Pernell v. Southall Realty*, 416 U.S. 363 (1974), addressed a landlord/tenant dispute implicating District of Columbia Code, not federal law. 416 U.S. at 363-64. *Pernell* also stressed the Court's rightful place adjudicating *de novo* disputes over "Congressional Acts directed toward the District." 416 U.S. at 368. *Griffin v. United States*, 336 U.S. 704 (1949), merely held that devising District of Columbia rules of evidence was the domain of the District's highest appellate court, "in the absence of specific Congressional legislation." 336 U.S. at 717. And *Fisher v. United States*, 328 U.S. 463 (1946) dealt with this Court's role in supervising the common law rulings of D.C courts, not rulings by those courts on the meaning of federal statutes.

Additionally, respondents' suggestion that the Supreme Court of Guam is entitled to deference because it supposedly "clearly interpreted" section 1422 "according to its terms" is entirely circular. Br. in Opp. at 22. Petitioners of course disagree with respondents' glowing assessment of the decision below. Pet. 13-14, 16-23.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

*Counsel of Record

Counsel for Petitioners

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

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